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No. 94-___

In The

Supreme Court of the United States

October Term, 1994

MICHAEL DUTTON, WARDEN,

Petitioner,

v.

RICHARD HOUSTON,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the *Brecht v. Abrahamson* harmless error standard require reversal of a first-degree murder conviction on the basis of a jury instruction that contained an unconstitutional mandatory rebuttable presumption on the element of "malice," where (a) the instruction at issue did not equate the concept of "malice" with "intent to kill," (b) other jury instructions on the separate and distinct element of "willfulness" accurately described the State's burden of proving beyond a reasonable doubt that the defendant intended to kill the victim, and (c) there was overwhelming evidence, independent of the presumption, that the defendant acted with "malice" toward the victim, as that term was defined in the court's instructions?

2. On collateral review of a death sentence imposed by a jury in a "weighing" state whose appellate courts perform harmless error analysis of alleged sentencing errors, must a federal habeas court automatically vacate any sentence which is based in part upon an invalid aggravating circumstance, or is the court instead authorized to determine whether the use of the invalid aggravator was harmless error?

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

The Attorney General and Reporter of the State of Tennessee, on behalf of Michael Dutton, Warden, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is published at 50 F.3d 381. The opinions of the district court (App. B and App. C) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1995. No rehearing was sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATEMENT OF THE CASE

I. Procedural History

After a jury trial in the Criminal Court of Knox County, Tennessee, respondent Richard Houston ("Houston") was convicted in November 1978 of premeditated first-degree murder and armed robbery and was sentenced to death by electrocution on the murder charge and to life imprisonment on the armed robbery charge. On January 7, 1980, the Supreme Court of Tennessee affirmed Houston's convictions and sentences. *Houston v. State*, 593 S.W. 2d 267 (Tenn. 1980). On October 6, 1980, this Court denied Houston's petition for a writ of certiorari. *Houston v. Tennessee*, 449 U.S. 891 (1980).

On March 13, 1981, Houston filed a petition for post-conviction relief in the Criminal Court of Knox County, Tennessee. After a hearing, the trial court denied the petition on October 20, 1982. The Tennessee Court of Criminal Appeals affirmed the trial court's denial of post-conviction relief in a 70-page opinion issued November 8, 1984. Thereafter, Houston filed an application for permission to appeal to the Supreme Court of Tennessee, which was denied on April 8, 1985, and a petition for a writ of certiorari in this Court, which was denied on June 2, 1986. *Houston v. Tennessee*, 478 U.S. 1014 (1986).

On August 29, 1986, Houston filed the instant habeas corpus action in the United States District Court for the Middle District of Tennessee. On December 16, 1993, Houston filed a motion for summary judgment raising seven separate claims which, he contended, required that his convictions and sentences be vacated. By memorandum and order entered May 19, 1994, and June 8, 1994, the district court granted summary judgment in favor of Houston on each of the seven claims, vacated Houston's death sentence and sentence of life imprisonment, and ordered that the writ of habeas corpus should issue unless, within 120 days, the State afforded Houston a new trial. (App. B, App. C).

By order entered August 26, 1994, the district court stayed its May 19, 1994, order pending appeal to the United States Court of Appeals for the Sixth Circuit. In an opinion filed March 28, 1995, the Court of Appeals affirmed in part and reversed in part, as more fully explained below. (App. A). By order filed May 15, 1995, the Court of Appeals stayed its mandate pending the filing of a petition for a writ of certiorari in this Court.

II. Facts Relevant to the Petition

Houston was convicted of the April 21, 1978 premeditated first-degree murder and armed robbery of Farris Stanley Balsinger, the proprietor of Stan's Gulf Station in Knoxville, Tennessee. The proof at trial is accurately summarized in the opinion of the Tennessee Supreme Court on Houston's direct appeal. *State v. Houston, supra,* 593 S.W. 2d at 269-70.

Mr. Balsinger's body was discovered lying on the floor of the men's restroom at Stan's Gulf by customer Kenneth Hill around 7:00 p.m. on the night in question. Hill had just finished pumping two dollars worth of gas into his car. While he was at the pump, he observed a man meeting Houston's description and wearing a brown leather jacket walk past him from the area of the station restroom and then up the street to a car parked at an apartment house lot located on the street behind the station. At the time, Hill thought nothing of the incident. When Hill went to the station office to pay for his gas, he discovered that all of the lights were out in the office and so walked around to the men's restroom on the side of the building hoping to find Mr. Balsinger there. Forcing the men's room door open with some difficulty, Hill found Mr. Balsinger shot to death, lying on his back with his head aimed toward the door.

Hill used the public telephone outside the station to call the police, who arrived on the scene a few minutes later. Hill supplied a description of the man he had seen walking away from the men's room, as well as of the car the man had entered in the apartment house parking lot up the street behind the station.

Mr. Balsinger had been shot three times, once through the left side of his mouth (exiting through his lower neck), once through his heart (exiting just under his shoulder blade) and once through his stomach (exiting from his lower back). The exit wound from his neck was 4'7" from the bottom of his feet; there was a broken tile and bullet mark on the rear wall of the restroom 4'7" from the floor, indicating that Mr. Balsinger had been standing when he received the shot through the mouth.

There were no powder burns surrounding this wound. By contrast, scorching on Mr. Balsinger's clothing and skin indicated that the chest and stomach wounds had been inflicted at point blank range.

There was no wallet or money found in the victim's clothing. Back in the station office, detectives found the cash drawer of the register standing open and empty. All of the rollers that hold the bills down in the cash drawer compartments were flipped up.

In summary, the evidence at the crime scene indicated that the robber had confronted Mr. Balsinger in the office, cleaned out the cash drawer, taken Mr. Balsinger around to the restroom, shot him once in the mouth while the victim was standing and then finished him off on the floor with point blank shots to the heart and vital organs of the gut.

Around 10:00 p.m. on the night of the crimes, police spotted a white Ford Fairlane in East Knoxville matching the description supplied to them earlier by Kenneth Hill. The officers pulled the car over after a brief high speed chase. Houston was behind the wheel; a young woman, Pam Taylor, was in the passenger seat. Once the two had left the car, police observed Houston attempting to slip something into Taylor's handbag. Taylor resisted the "pass," and the police grabbed from Houston's hand a wad of cash – $106.00. There were stains which appeared to be blood on some of the bills.

After obtaining Houston's consent to search the car, police discovered a brown paper bag under the driver's seat containing credit card receipts and checks made out to Stan's Gulf and a green leather wallet belonging to

Balsinger. Three spent .38 caliber cartridges were also on the floor. On the back seat, police found a .38 revolver wrapped in a blanket. Ballistics analysis later matched the revolver found in Houston's car with the .38 caliber slugs found with the victim in the service station restroom. A handkerchief with blood on it matching the victim's basic blood typing was also found in the car. During a later search of the motel room Houston and his companion had rented earlier in the evening, the police found a brown leather jacket like the one worn by the man spotted by Kenneth Hill leaving the scene of the crime, as well as a pair of pants with bloodstains matching the basic blood type of the victim.

Houston confessed a few hours after his arrest to the armed robbery of Mr. Balsinger but claimed that the victim had been shot when the pistol started going off during a struggle for the gun:

> On 4-21-78 about 3:30 p.m., I drove to Dandridge to Miss Taylor's house. She was at work. I told her sister I would be back. I went back about 5:30 p.m. and picked up Pam. We went to the grocery store to meet her mother, and then we went to the drugstore to get a prescription filled for her son. We drove into Knoxville and stopped at the Sunbeam Motel, Room No. 2, on Asheville Highway. We checked in. We left the motel to get something to eat and visit my cousin in Knoxville. I stopped to make a phone call. We stopped right behind a Gulf Station. I walked down to use the phone to call my cousin. I went to the service station. The attendant was going into the bathroom, I guess to check something. I started towards him to ask if he had a phone. I did ask him. I noticed a green

> wallet sticking out of his right pocket. I just decided to take it. I had no place to live in the last week, and my ole lady, my wife, and I split up. When I approached him, when I stepped towards him, I pulled a gun out of my waistband. He saw me and grabbed the pistol barrel, and we tasseled (sic) for three to five minutes. I told him to give me the money. He said no. He had the pistol pointed towards me and was trying to pull the trigger by putting his thumb against my forefinger. He said, "This damn thing won't shoot, this damn thing won't shoot, will it?" I said, "Man, just give me the money." He said, "No way." The other man would be around here in a few minutes. I said, "Man, just let me go out of the bathroom, just let me go out of the bathroom, just let me get away." Both of us was still wrestling for the pistol. The bathroom was shut, and it was dark. We were there just wrestling. I was trying to pull the pistol out of his hand, and the pistol started going off. It started going off. It fired two, three, four times. When I opened the door to go out, I saw the billfold, and I picked it up and ran back to the car. Pam did not know what was happening. We went back to the Sunbeam Motel. I took a shower and changed clothes. I drank three beers. I told Pam what I had done. She was scared and wanted to go home. We came back to Knoxville and ate at the Kentucky Fried Chicken.

(T.T., 555-556).

Houston's rendition of the crimes did not square with the physical evidence at the crime scene. For example, it did not account for the relatively wide separation

of the victim's three wounds (mouth, chest, gut); it provided no explanation why the chest and gut wounds were administered from point blank range while the mouth wound was apparently caused from a distance; and it did not explain how a person receiving one of these severe gunshot wounds could possibly carry on the wrestling match that, according to Houston's post-arrest statement, produced the second and third. Houston's story was also at odds with the account of customer Kenneth Hill, who observed the man he saw at the crime scene walk – not run – back to the car parked up the street behind the station and whose suspicions were not in the least aroused by the demeanor of that man.

At the conclusion of the evidence presented at the guilt phase of Houston's trial, the trial court instructed the jury on the elements of murder, in pertinent part, as follows:

* * *

> An individual commits Murder in the First Degree, as charged in the Second Count of this case if he commits a willful, deliberate, malicious, and premeditated killing. *For you to find the defendant guilty of Murder in the First Degree as charged in the Second Count, the State must prove beyond a reasonable doubt:*
>
> (1) That the defendant unlawfully killed the alleged victim.
>
> (2) *That the killing was malicious.*
>
> (3) *That the killing was willful. This means that the defendant must have intended to take the life of the alleged victim.*

(4) That the killing was deliberate, that is, with cool purpose.

(5) That the killing was premeditated, premeditation being the principal element of this offense. This means that the intent to kill must have been formed previous to the act itself. Such intent or design to kill may be conceived and deliberately formed in an instant. It is not necessary that the purpose to kill pre-exists in the mind of the accused for any definite period of time. It is sufficient that it preceded the act, however short the interval. The mental state of the accused at the time he allegedly instigated the act which resulted in the alleged death of the deceased must be carefully considered in order to determine whether or not the accused was sufficiently free from excitement and passion as to be capable of premeditation. Passion does not always reduce the crime below Murder in the First Degree, since a person may deliberate, and may intend to kill after premeditation and deliberation although prompted and to a large extent controlled by passion at the time. If the design to kill was formed with deliberation and premeditation, it is immaterial that the accused may have been in a passion or excited when the design was carried into effect.

If you find from your consideration of all the elements that the State has proven each of the elements of First Degree Murder beyond a reasonable doubt, then you should find the defendant guilty of First Degree Murder.

If, on the other hand, you find that the State has not proven each of the elements of First Degree Murder beyond a reasonable doubt, then you will proceed to inquire whether or not the defendant is guilty of the lesser included offense of Murder in the Second Degree.

An individual commits Murder in the Second Degree if he commits a malicious killing. For you to find the defendant guilty of the lesser included offense of Murder in the Second Degree, the State must prove beyond a reasonable doubt:

(1) That the defendant unlawfully killed the alleged victim.

(2) That the killing was malicious.

Malice is an essential ingredient of murder, and it may be either express or implied. Express malice is actual malice against the party slain. Implied malice is malice not against the slain, but malice in general, or that condition of mind which indicates a wicked, depraved, and malignant spirit, and a heart regardless of social duty and fatally bent on mischief.

If the State proves beyond a reasonable doubt that a killing has occurred, it is presumed to be malicious unless rebutted by other facts and circumstances to the contrary.

Deliberate purpose is not essential in making out the crime of murder in the Second Degree; and although the proof may show that the defendant did design or intend to kill, still, if the design was formed upon a sudden impulse of passion, without adequate provocation and disconnected with any previously formed design, and if executed willfully and maliciously, it would be Murder in the Second

Degree only. To constitute Murder in the Second Degree the proof must show that the killing was unlawful and malicious.

A deadly weapon is an instrument, which from the use made of it at the time, is likely to produce death or to do great bodily harm. The use of a deadly weapon by the party killing, when shown, raises a presumption of malice sufficient to sustain a charge of Second Degree Murder unless it is rebutted by other facts and circumstances to the contrary.

You should look to all the facts and circumstances developed by the evidence in this case to determine whether or not the State has proved beyond a reasonable doubt the existence of malice.

If you find from your consideration of all the evidence that the State has not proven each of the elements of First Degree Murder beyond a reasonable doubt, but that it has proven each of the elements of the lesser included offense of Second Degree Murder beyond a reasonable doubt, then you should find the defendant guilty of Second Degree Murder.

* * *

(App. D) (emphasis supplied).

The jury convicted Houston of premeditated first degree murder and of armed robbery.

At the sentencing phase of Houston's trial, the jury unanimously found three statutory aggravating circumstances to support the imposition of the death penalty for the murder:

(i) that "the murder was especially heinous, atrocious, or cruel in that it involved torture or

depravity of mind," Tenn. Code Ann. § 39-2404(i)(5) (Supp. 1978);

(ii) that "[t]he murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant," Tenn. Code Ann. § 39-2404(i)(6) (Supp. 1978); and

(iii) that "[t]he murder was committed while the defendant was engaged in committing . . . robbery . . . " Tenn. Code Ann. § 39-2404(i)(7) (Supp. 1978).

At the sentencing hearing, the State relied solely on the evidence presented during the guilt phase of the trial to establish these aggravators.

The jury unanimously concluded that there were no mitigating circumstances sufficient to outweigh the aggravating circumstances found to exist and imposed a sentence of death on the murder conviction. The trial court later sentenced Houston to life imprisonment on the armed robbery conviction.

III. The Opinions Below

The district court granted habeas relief and vacated Houston's convictions and sentences on seven grounds. With respect to Houston's first degree murder conviction, the district court believed (1) that there was insufficient evidence from which a rational juror could have found the elements of premeditation and deliberation beyond a reasonable doubt (App. C, 40-43); (2) that the state trial court's jury instructions on the "presumption of malice" violated this Court's decision in *Sandstrom v. Montana*,

442 U.S. 510 (1979), and was reversible error (App. C, 33-39); (3) that the handcuffing of Houston during one thirty-minute period of his five-day trial denied him due process of law (App. C, 47-51); and (4) that three isolated remarks by the prosecutor during closing argument at the guilt phase of Houston's trial constituted impermissible comment upon Houston's failure to testify and required reversal (App. C, 43-47). The district court vacated Houston's death sentence on the following three grounds: (1) that the version of Tennessee's "heinous, atrocious or cruel" aggravating circumstance in effect at the time of Houston's trial and found by Houston's jury was unconstitutionally vague (App. C, 51-56); (2) that the trial court's instructions at the sentencing hearing impermissibly led the jury to believe that unanimity was required on mitigating circumstances (App. C, 56-64); and, (3) that the trial court violated Houston's constitutional rights by refusing to instruct the jury concerning his eligibility for parole if sentenced to life imprisonment (App. C, 64-68). Finally, without any discussion or analysis, the district court also vacated Houston's conviction and life sentence for armed robbery (App. C, 69).

The court of appeals affirmed in part and reversed in part. Finding that none of the errors cited by the district court could have had "a substantial and injurious effect or influence upon the jury's deliberations concerning [Houston's] guilt of armed robbery", the court ordered the armed robbery conviction and life sentence reinstated. (App. A, 14-15). The court also reversed the district court's determination that there was insufficient evidence to support Houston's first degree murder conviction, concluding that "[t]he evidence, viewed in the light most

favorable to the State, is sufficient to allow a rational jury to find that Houston deliberately and premeditatedly killed Stanley Balsinger in order to eliminate the only eyewitness to his crime and to prevent his own arrest." (App. A, 5). However, the court affirmed the district court's ruling that the state trial court's jury instruction on the "presumption of malice" required reversal of Houston's first degree murder conviction. (App. A, 8-12). The court reasoned that the unconstitutional "presumption of malice" instruction may have caused the jury to reject Houston's "accidental" killing defense based upon mere proof "that a killing has occurred" and to find the elements of premeditation, deliberation and willfulness based upon the presumption of malice as well. (App. A, 10-11). The court rejected the State's contention that the instruction could *not* have had such an effect on the jury's deliberations, given that the definition of malice supplied to Houston's jury did not in any way equate "malice" with "intent to kill," that Houston's jury was properly instructed that the separate and distinct element of "willfulness" "means that the defendant must have intended to take the life of the alleged victim," and that there was overwhelming evidence of "malice" as that term was in fact defined for the jury. (App. A, 11-12).

The court of appeals also agreed with the district court that Houston's death sentence must be vacated because it was based in part upon a constitutionally invalid aggravator – that the murder was "especially heinous, atrocious or cruel in that it involved torture or depravity of mind." The State conceded in the court of appeals that there was insufficient evidence of "torture or depravity of mind," as those terms had been defined in a

limiting construction adopted by the Supreme Court of Tennessee. *See State v. Williams*, 690 S.W. 2d 517 (Tenn. 1985). But the State argued that the use of this aggravating circumstance was harmless error, given that the jury found two other aggravating circumstances which were supported by strong evidence, that no evidence beyond that already properly before the jury during the guilt phase had been relied upon by the prosecutor at sentencing to prove the invalid aggravator, and that there was a virtual absence of any mitigating evidence. Like the district court, the court of appeals believed that a federal habeas court is required by this Court's decision in *Richmond v. Lewis*, 113 S. Ct. 528 (1992), automatically to vacate a death sentence infected by an invalid aggravator. Accordingly, the court did not address the State's contention that the use of the "heinous, atrocious or cruel" aggravator was harmless in the circumstances of this case. (App. A, 13-14).

REASONS FOR GRANTING THE PETITION

I. THE LOWER FEDERAL COURTS REQUIRE THIS COURT'S GUIDANCE CONCERNING THE PROPER APPLICATION OF THE HABEAS CORPUS HARMLESS ERROR STANDARD TO JURY INSTRUCTIONS CONTAINING UNCONSTITUTIONAL MANDATORY REBUTTABLE PRESUMPTIONS.

This case presents an opportunity for this Court to decide how the habeas corpus harmless error standard enunciated in *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993), is properly applied to jury instructions that violate the

principles of *Sandstrom v. Montana*, 442 U.S. 510 (1979). Although the Court has held that jury instructions containing unconstitutional mandatory rebuttable presumptions are subject to harmless error review (*Rose v. Clark*, 478 U.S. 570 (1986)), and has analyzed such error under *Chapman v. California*, 386 U.S. 18 (1967), for harmlessness "beyond a reasonable doubt" (*Yates v. Evatt*, 111 S. Ct. 1884 (1991)), the Court has not yet had occasion to demonstrate the proper application of the "less onerous" standard which now applies on habeas review to such "constitutional error[s] of the trial type." *Brecht v. Abrahamson, supra*, 113 S. Ct. at 1717, 1722.

The decision below illustrates the need for this Court's authoritative guidance on this issue. Houston's jurors were instructed that, in order to convict him of first-degree murder, they were required to find that the State had proven beyond a reasonable doubt "*each* of the elements" of the crime, to wit:

> (1) That the defendant unlawfully killed the alleged victim.
>
> (2) That the killing was malicious.
>
> (3) *That the killing was willful. This means that the defendant must have intended to take the life of the alleged victim.*
>
> (4) That the killing was deliberate, that is, with cool purpose.
>
> (5) That the killing was premeditated . . . This means that the intent to kill must have been formed previous to the act itself.

(App. D, 74-75). The term "malice" was defined for the jurors as follows:

> Malice is an essential ingredient of murder, and it can be either express or implied. Express malice is actual malice against the party slain. Implied malice is malice not against the slain, but malice in general, or that condition of mind which indicates a wicked, depraved, and malignant spirit, and a heart regardless of social duty and fatally bent of mischief.

(App. D, 75-76). Finally, the jurors were told that "[i]f the State proves . . . that a killing has occurred, it is presumed to be malicious unless rebutted by other facts and circumstances to the contrary" and that "[t]he use of a deadly weapon by the party killing, when shown, raises a presumption of malice sufficient to sustain a charge of Second Degree Murder unless it is rebutted by other facts and circumstances to the contrary." (App. D, 76).

The court of appeals held, and the State conceded, that the last portion of these instructions constituted an unconstitutional mandatory rebuttable presumption relating to one of the elements of the crime – malice – in violation of this Court's decisions in *Sandstrom v. Montana, supra,* and *Francis v. Franklin,* 471 U.S. 307 (1985). The court of appeals erred, however, when it considered whether the defective instruction warranted relief on habeas corpus. While the court paid lip service to the *Brecht v. Abrahamson* harmless error standard (App. A, 10), its conclusion that the instructional error was not harmless in the circumstances of this case can be justified, if at all, only under a standard of harmlessness "beyond a reasonable doubt," which, after *Brecht,* is no longer appropriate on habeas review.

Under any common sense application of *Brecht*, it is plain that the defective instruction in this instance could not have had any "substantial and injurious effect or influence" upon the verdict. The state trial court's instructions did *not* equate the concept of "malice" with "intent to kill."[1] *Compare Yates v. Evatt, supra*, 111 S. Ct. at 1895 ("the trial judge told the jury that malice is the equivalent of an 'intention to kill' without legal justification or excuse"). Rather, Houston's jury was told that a separate and distinct element of the crime – "willfulness" – meant "that the defendant must have intended to take the life of the alleged victim." In addition, "malice" was separately defined for Houston's jury in terms of the defendant's mental attitude toward the victim and/or the transaction which produced the victim's death, *i.e.*, as involving either actual ill will directed specifically at the victim or a more generic "malignant spirit . . . regardless of social duty and fatally bent on mischief." Thus, it is sheer speculation to assume, as did the court below, that "the instruction to presume malice . . . essentially told the jury to reject [Houston's] claim that the shooting was accidental." (App. A, 10-11). This could only be true if Houston's jury confused the element of "willfulness"

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[1] The district court stated that "[a] conviction for first degree murder in Tennessee requires malice (intent to harm) and evidence of accident negates malice," citing *State v. Martin*, 702 S.W. 2d 560, 562-3 (Tenn. 1985). (App. B, 37). Aside from mischaracterizing *Martin*, the district court ignored the text of the instructions in *Martin* which, unlike the instructions given in this case, actually equated malice with intent to kill. 702 S.W. 2d at 563. What matters is the particular instructions given to Houston's jury; judicial pronouncements about instructions in other cases are not relevant.

with the element of "malice," assumed despite the trial judge's clear instructions otherwise that the two concepts meant the same thing, and disregarded its duty to find *each* element of the crime beyond a reasonable doubt.

In short, notwithstanding the court of appeals' insistence to the contrary (App. A, 10), a "malicious accident" is *not* an "oxymoron" in the linguistic universe of the instructions issued to Houston's jury. It is entirely possible for one person *accidentally* to kill another against whom he harbors ill will or has directed a "malignant spirit," for example, if an armed robber were accidentally to shoot the target of his robbery during a struggle with the victim for the robber's gun. That, of course, was precisely the theory of Houston's defense, and there was certainly nothing in the trial judge's instructions that can fairly be said to have precluded the jury from accepting that theory of the proof.

Petitioner submits that the harmless error standard that should be applied in cases of this nature is whether, taking the jury instructions as a whole and in light of the entire record, the jury would have found it *unnecessary* to rely upon the unconstitutional mandatory rebuttable presumption in order to find the element in question. A closely analogous formulation was discussed by this Court in *Yates v. Evatt, supra,* 111 S. Ct. at 1894 n.11, and was characterized as "less rigorous" than the *Chapman v. California* "beyond a reasonable doubt" standard which the Court, prior to *Brecht,* decided to apply in *Yates.* The proposed test is one that faithfully reflects the policies underlying the "less onerous" *Brecht* standard which has now come to govern habeas corpus review of constitutional trial error.

Applied to the circumstances of this case, the test proposed by petitioner would compel the conclusion that the defective malice instruction had no substantial and injurious effect or influence on this verdict. The evidence that Houston acted with "malice" toward the victim was overwhelming under the definition of "malice" supplied to Houston's jury: Houston's own confession established that he was in the course of robbing Mr. Balsinger at gunpoint when he killed him. Moreover, as the court of appeals itself conceded, the evidence was "sufficient to allow a rational jury to find that Houston deliberately and premeditatedly killed Stanley Balsinger in order to eliminate the only eyewitness to his crime and to prevent his own arrest." (App. A, 5). Given this evidence, is it possible that a rational juror would have found it necessary to rely upon the unconstitutional presumption to find "malice"? The question answers itself.

Before *Brecht*, a reviewing court was required to determine "beyond a reasonable doubt that the presumptions must have made no difference in reaching the verdict obtained." *Yates v. Evatt, supra*, 111 S. Ct. at 1895. Obviously, that standard is no longer viable after *Brecht*. The Court should grant review in this case to instruct the lower courts concerning how the *Brecht* standard is to be applied in this context.

II. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS CONCERNING WHETHER FEDERAL HABEAS COURTS ARE AUTHORIZED TO CONDUCT HARMLESS ERROR REVIEW OF ERRORS COMMITTED DURING THE SENTENCING PHASE OF A CAPITAL CASE.

This Court should also grant review in this case to resolve the conflict among the circuits concerning whether federal habeas courts are authorized (or, indeed, required) to perform harmless error analysis of errors committed during the sentencing phase of a capital case. The court below held that federal habeas courts are precluded by this Court's decision in *Richmond v. Lewis*, 113 S. Ct. 528 (1992), from performing such review and are required automatically to vacate a death sentence whenever it is determined that the sentence is based in part upon an invalid aggravating circumstance. By contrast, the courts of appeals for the Fourth and Eighth Circuits have held that federal habeas courts *are required* to conduct harmless error analysis in such circumstances and have expressly rejected the interpretation of *Richmond v. Lewis* adopted by the Sixth Circuit in this case. *See Smith v. Dixon*, 14 F. 3d 956, 974-9 (4th Cir.), *cert. denied*, 115 S. Ct. 129 (1994); *Williams v. Clarke*, 40 F. 3d 1529, 1539-42 (8th Cir. 1994).

Tennessee was at the time of Houston's conviction, and remains, a so-called "weighing" state – a state in which the jury must determine that sufficient statutory aggravating circumstances exist to outweigh any mitigating factors in order to impose a sentence of death. Tenn. Code Ann. § 39-2404(g)(Supp. 1978) (now § 39-13-204(g)). In

addition, the Tennessee Supreme Court conducts harmless error analysis when reviewing a death sentence based in part upon an invalid aggravating circumstance. *State v. Howell*, 868 S.W. 2d 238, 259-62 (Tenn. 1993).[2] In *Howell* itself, as well as in subsequent cases, the Tennessee Supreme Court has also made clear that *Howell* harmless error analysis is to be performed in all cases involving defective aggravators, including cases such as this one where sentence was imposed before *Howell*. *E.g.*, *State v. Smith*, 893 S.W. 2d 908, 925-6 (Tenn. 1994); *State v. Cazes*, 875 S.W. 2d 253, 269-71 (Tenn. 1994).

In the court of appeals, the State conceded that there was insufficient evidence to support the use of Tennessee's "heinous, atrocious or cruel" aggravating circumstance in Houston's case under the Tennessee Supreme Court's limiting construction of that aggravator, which requires proof of torture, serious physical abuse, or mutilation of the body soon after death. *See State v. Williams*, 690 S.W. 2d 517 (Tenn. 1985). But the State argued that the use of the unsupported aggravator should not require reversal of Houston's death sentence, given the jury's finding of two additional aggravating circumstances which were supported by overwhelming evidence, the

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[2] The factors to be considered under *Howell* are (i) the number and strength of remaining valid aggravating circumstances, (ii) the prosecutor's closing argument at sentencing, (iii) whether the invalid aggravator was established by evidence that was materially inaccurate or admissible only to support the invalid aggravator or whether it was instead supported by evidence otherwise admissible in either the guilt or sentencing phase, and (iv) the nature, quality, and strength of mitigating evidence. 868 S.W. 2d at 261-2.

paucity of mitigating evidence, and the fact that the jury was not exposed during the sentencing phase of Houston's trial to any new evidence introduced for the purpose of establishing the "heinousness" aggravator. In other words, it was the State's position that the use of the invalid aggravator made no difference to the outcome. The court of appeals refused to address that argument.

None of the reasons cited by the court of appeals for declining to assess the impact of the error upon Houston's sentence is persuasive. Certainly, *Richmond v. Lewis* does not compel this result. *Richmond* involved a so-called "appellate reweighing" state (Arizona), *not* a "harmless error" state like Tennessee. Under Arizona law, once an appellate court had determined that a death sentence had been infected by the use of an invalid or unsupported aggravator, the appellate court itself was required to reweigh any remaining valid aggravators against any mitigating evidence in the record and make an independent sentencing determination. *Richmond, supra,* 113 S. Ct. at 535 (under Arizona law, "the justices of the Supreme Court of Arizona have an obligation to reweigh as part of the 'independent review' of death sentences"). Obviously, state appellate reweighing can only be performed by a state appellate sentencer; federal courts lack the authority to impose sentence in state criminal cases. Because the record in *Richmond* demonstrated that a majority of the justices of the Arizona Supreme Court did not even "purport to perform such a calculus, or even mention the evidence in mitigation" before approving the petitioner's death sentence, this Court held the sentence invalid. Thus, it was in the

particularized and limited context of the Arizona appellate "reweighing" scheme that the Court observed in *Richmond* that, "where the death sentence has been infected by a . . . constitutionally invalid aggravating factor, the state appellate court or some other state sentencer must actually perform a new sentencing calculus, if the sentence is to stand." 113 S. Ct. at 535.

In Tennessee, by contrast, state appellate courts do *not* make an independent sentencing calculus, weighing remaining valid aggravators against mitigating circumstances, but instead conduct harmless error review of death sentences based in part upon invalid aggravators. *E.g., State v. Howell, supra. Richmond* cannot be read as precluding federal habeas courts from conducting harmless error review in cases arising from harmless error states. Indeed, as noted by the Fourth Circuit in *Smith v. Dixon, supra,* to eschew harmless error analysis in cases such as this one would violate the fundamental principle that federal habeas courts may not grant habeas relief "unless the petitioner . . . demonstrates that . . . [constitutional] error 'had substantial and injurious effect or influence in determining the jury's verdict'". *Smith,* 14 F. 3d at 975, *quoting Brecht v. Abrahamson, supra,* 113 S. Ct. at 1722 (1993).

Nor should it matter that no state court has analyzed the impact of the invalid aggravator on Houston's sentence. The Tennessee Supreme Court found no error relating to the use of the "heinousness" aggravator on direct appeal of Houston's conviction and sentence and, thus, had no occasion to perform harmless error analysis. *Houston v. State, supra,* 593 S.W. 2d at 276. In these circumstances, considerations of federal-state comity do not

require a federal habeas court to stay its hand in order to give the state courts an opportunity to conduct the analysis. Indeed, fifteen years after the final disposition of Houston's direct appeal, it is doubtful whether any state court in Tennessee would have jurisdiction to take up the question.

The better view is the one adopted by the Fourth and Eighth Circuits in *Smith* and *Williams, supra*. Both of those cases involved errors resulting from a state sentencer's consideration of an invalid aggravating circumstance; and, in both, the occasion to conduct harmless error analysis first arose in federal habeas court, not state court. Both courts rejected the position endorsed by the Sixth Circuit in this case, as being "at odds with the purposes of harmless error analysis in federal habeas review – fostering regard for the criminal judicial process by disregarding errors that have not contributed to the result and granting relief from final state convictions and sentences only to those petitioners who can demonstrate that they have been grievously wronged." *Smith v. Dixon, supra*, 14 F. 3d at 979. *Accord, Williams v. Clarke, supra*, 40 F. 3d at 1540. Moreover, as noted by the *Smith* court, it is beyond dispute that conducting harmless error review when a death sentence is infected by an invalid aggravator is a task for which federal habeas courts are "adequately equipped." 14 F. 3d at 979.

This Court should grant review in this case to settle this important question of federal habeas corpus jurisprudence concerning which there is disagreement among the lower federal courts.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

No. 94-6064

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RICHARD HOUSTON, *Petitioner-Appellee,*	)	
v.	)	ON APPEAL from the United States District Court for the Middle District of Tennessee
MICHAEL DUTTON, Warden, Tennessee State Penitentiary, *Respondent-Appellant.*	)	

Decided and Filed March 28, 1995

Before: MERRITT, Chief Judge; GUY and RYAN, Circuit Judges.

MERRITT, Chief Judge. In this Tennessee death penalty case, the District Court issued a writ of habeas corpus in favor of petitioner Houston, finding seven separate constitutional grounds for setting aside Houston's first degree murder conviction, death sentence, and armed robbery conviction. We uphold the writ on two of the grounds, disagree with the District Court on one of the grounds, pretermit the State's remaining four assignments of error, and reinstate the armed robbery conviction.

The State concedes that the trial court in Knoxville erred in two respects relating to the constitutional requirements of first degree capital murder but claims

that the errors were harmless. *First,* by instructing the jury that it should "presume malice" (a key element of first degree murder) from the killing itself and the use of a gun – neither of which was disputed – the state trial court violated the rule of *Sandstrom v. Montana,* 442 U.S. 510 (1979) (presumptions that shift burden from State to defendant in criminal proceeding unconstitutional); *Francis v. Franklin,* 471 U.S. 307 (1985) (mandatory rebuttable presumption of malice instruction unconstitutional because it shifts burden from State to defendant); and *Yates v. Evatt,* 500 U.S. 391 (1991) (courts not to assume such mandatory rebuttable presumptions are harmless error). *Second,* by instructing the jury at the sentencing hearing that it should impose the death penalty if it should find the crime to be "heinous, atrocious or cruel" (and not outweighed by any mitigating circumstance), the state trial court violated another line of cases holding that such an instruction is too vague and uninformative to properly guide the jury in reaching a death verdict. *Maynard v. Cartwright,* 486 U.S. 356 (1988) (Oklahoma's "heinous, atrocious or cruel" aggravating circumstance too vague to constitutionally channel jury's discretion to impose death penalty); *Richmond v. Lewis,* 113 S. Ct. 528 (1992) (unconstitutional "heinous, atrocious or cruel" aggravator taints sentencing process and requires remand to state court for resentencing).

These two constitutionally invalid instructions require the habeas corpus remedy as ordered by the District Court for the reasons outlined below. The District Court erred, however, in its finding that the evidence of first degree murder offered by the State was insufficient under the Due Process Clause to justify a rational jury in

making such a finding. We will discuss the sufficiency of the evidence point first and then the two erroneous instructions before concluding with a section holding that the District Court erred in setting aside the armed robbery conviction.

I. THE SUFFICIENCY OF THE EVIDENCE UNDER *JACKSON V. VIRGINIA*

As one of the grounds in support of granting Houston's habeas petition, the District Court found insufficient evidence of premeditation and deliberation to sustain a finding of first-degree murder under Tennessee law. Where the sufficiency of the evidence is challenged, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

The evidence is strong, indeed practically undisputed, that Houston, during the course of a robbery, killed the owner of a Knoxville gas station in the bathroom at the rear of the gas station. Houston's sole defense at trial was that the killing was an accident that occurred during the course of a struggle over the gun used in the robbery. Although it is possible that the killing could have occurred as the defendant stated in his confession, the circumstantial evidence supports an inference of premeditation and deliberation.

The evidence supports the following propositions of fact. Houston approached Stanley Balsinger's Gulf station in Knoxville with a loaded .38 caliber revolver. That

weapon killed Balsinger, an unarmed victim. Each of the victim's three wounds hit areas of the body likely to produce death – the face, the heart, and the vital organs of the mid-section. Although there is conflicting testimony in the record regarding the existence of powder burns on the mouth wound, the state's pathologist said that there were no such burns on the mouth. This supports an inference that the mouth wound was inflicted first, from a distance. The evidence indicates that the face wound was not fatal, but would certainly have incapacitated Balsinger, rendering him helpless. The powder burns around the two other wounds to the heart and mid-section indicate that the shots were fired at point-blank range. In contrast to Houston's testimony that he ran away from the shooting after an extended struggle, Kenneth Hill, a witness who did not see or hear the shots, testified that he watched Houston walk calmly away from the area of the service station restroom back to his car. The defendant's calm demeanor after the shooting can be inferred from the testimony that he went back to his hotel room, deliberately reloaded his gun, had three beers, took a shower, attempted to destroy the evidence of the crime by washing away the victim's blood from his stained clothing, asked his girlfriend for sex, and then went out for dinner, driving by the murder scene on his way to Kentucky Fried Chicken to see whether there was any police activity. When viewed as a whole, the defendant's activities after the murder further support an inference that he premeditated and deliberated about killing Stanley Balsinger after robbing him. They allow the jury to reject the defendant's theory that this was a spur of the

moment robbery which ended in an extended, deadly struggle over a gun.

Under *Jackson*, the entire record is to be reviewed and all reasonable inferences must be drawn in favor of the State. From these circumstances, a rational fact finder could have inferred beyond a reasonable doubt that Houston, notwithstanding testimony that the gun accidentally went off in a scuffle, thought about killing Balsinger in advance and did in fact do so after robbing him. Under the standards accepted in Tennessee in 1980, Houston had sufficient time to premeditate and deliberate about the killing of Stanley Balsinger. The evidence, viewed in the light most favorable to the State, is sufficient to allow a rational jury to find that Houston deliberately and premeditatedly killed Stanley Balsinger in order to eliminate the only eyewitness to his crime and to prevent his own arrest.

In *Houston v. State*, 593 S.W.2d 267 (Tenn.), *cert. denied*, 449 U.S. 891 (1980), the original state opinion in the direct appeal of this case, the majority affirmed Houston's conviction for first degree murder, finding explicitly that premeditation and deliberation could be inferred from the circumstances of the murder, including the evidence of multiple gunshot wounds. In *State v. Brown*, however, the Tennessee Supreme Court held that evidence of repeated blows was no longer sufficient evidence alone from which to infer premeditation. The *Brown* Court explained that repeated blows "can be delivered in the heat of passion, with no design or reflection." 836 S.W.2d 530, 542 (Tenn. 1992). This holding is unsurprising because it is a rare killing where the only

circumstantial evidence available is multiple gunshots. In *Bass v. State*, the Tennessee Supreme Court said:

> While willful killing with a deadly weapon is not a sufficient basis for an inference of premeditation and deliberation, it is seldom that the evidence in a case of homicide is restricted to no more than these bare facts and it is commonly the case that the jurors have before them other circumstances from which they may infer the existence or the want of mental elements of premeditation and deliberation.

231 S.W.2d 707, 711 (Tenn. 1950).

Citing *Brown*, the District Court held that under Tennessee law the mere fact that the victim had multiple gunshot wounds is an insufficient basis from which a jury may infer premeditation and deliberation. The District Court concluded that "[t]he State's evidence fell short as a matter of law of the constitutional minimum needed to convince a rational juror beyond a reasonable doubt that the killing was premeditated and deliberate." *See* Memorandum of Federal District Court, Joint Appendix at 1184. The District Court's holding, based on the constitutional insufficiency of the evidence at Houston's trial, if upheld, would mean that under normal circumstances a retrial of Houston for murder would be barred by the double jeopardy clause of the Fifth Amendment ("nor shall any person be subject for the same offence be twice put in jeopardy of life or limb".).

Brown, however, should not be applied this way in this federal habeas appeal. Although *Brown* discussed the precedent set in *Houston*, it did not overturn his conviction. It overruled *Houston* only "to the extent that the

opinions in *Houston* and *Martin* can be read to hold otherwise. . . . " 836 S.W.2d at 543. This uncertain modification of state law leads us to the conclusion that the federal District Court erred when it applied *Brown* to set the federal standards for a sufficiency of the evidence analysis. As stated above, under the analysis in *Jackson v. Virginia* there is sufficient evidence in the record here beyond the bare fact of three shots to allow a rational juror to find beyond a reasonable doubt that the killing was premeditated and deliberate.

Moreover, no Tennessee court to date has held that Houston's conviction must be reversed in light of *Brown*. Significantly, Houston applied for post-conviction relief in light of *Brown*. On November 24, 1992, he filed a Motion to Recall the Mandate in the Tennessee Supreme Court. In his brief in support of the motion, Houston argued that the court should review his case under the *Brown* standards and urged the court to modify his conviction to second degree murder. In an order dated March 11, 1993, the Tennessee Supreme Court found that this motion was without merit and refused to recall its mandate. When and how state law applies to a particular case is a matter on which the state supreme court has the last word. *See Estelle v. McGuire*, 502 U.S. 62, 67-88 (1991) ("We have stated many times that 'federal habeas corpus relief does not lie for errors of state law'. . . . [I]t is not the province of a federal habeas court to reexamine state court determinations on state law questions.") (citation omitted). No federal issues are implicated and no federal question is presented in determining whether a change in state law is to be applied retroactively.

II. THE PRESUMPTION OF MALICE INSTRUCTION

The fact that the evidence was sufficient to allow a jury to convict, of course, does not end the matter. The judge's instructions to the jury as to the law and how the evidence should be assessed are crucial to a fair trial. They should guide the jury's deliberations and are not mere technicalities in our legal system. Errors in such matters may go to the heart of the question of guilt.

The trial judge gave the following instruction which the State concedes (as to the underlined portions) violates the rule of *Sandstrom v. Montana*, 442 U.S. 510 (1979), *Francis v. Franklin*, 471 U.S. 307 (1985), and *Yates v. Evatt*, 500 U.S. 391 (1991), in that it shifts to the defendant the burden of disproving malice:

> Malice is an essential ingredient of murder, and it may be either express or implied. Express malice is actual malice against the party slain. Implied malice is malice not against the slain, but malice in general, or that condition of mind which indicates a wicked, depraved, and malignant spirit, and a heart regardless of social duty and fatally bent on mischief.
>
> *If the State proves beyond a reasonable doubt that a killing has occurred, it is presumed to be malicious unless rebutted by other facts and circumstances to the contrary.*
>
> * * *
>
> A deadly weapon is an instrument, which from the use made of it at the time, is likely to produce death or to do great bodily harm. *The use of a deadly weapon by the party killing when shown, raises a presumption of malice sufficient to sustain a*

> *charge of Second Degree Murder unless it is rebutted by other facts and circumstances to the contrary.*
>
> You should look to all the facts and circumstances developed by the evidence in this case to determine whether or not the State has proved beyond a reasonable doubt the existence of malice.

T.T. 602-3

The same definition of malice was used in the charge to cover first and second degree murder. T.T. 598-603.

In *Sandstrom* the Supreme Court held that such burden-shifting by presumption violates the Due Process Clause of the Constitution. 442 U.S. at 520. It is unconstitutional to shift the burden of proving an element of a crime to the defendant. It lifts from the state the burden that it must bear, and then it puts the burden upon the accused, who constitutionally should not suffer under it: "[T]he Fourteenth Amendment's guarantees prohibit a State from shifting to the defendant an element of the crime charged." *Sandstrom*, 442 U.S. at 527 (Rehnquist, J., concurring).

This concept was applied specifically to presumed malice instructions in *Francis v. Franklin*. The Court held that a mandatory rebuttable presumption violates the Due Process Clause. 471 U.S. at 317. In *Yates v. Evatt*, 500 U.S. 391 (1991), the Court again found a mandatory rebuttable presumption unconstitutional. As here, the instruction in that case told the jury to infer malice from either an unlawful act, like a killing, or from the use of a deadly weapon, and the Court warned that we should not

assume that such unconstitutional instructions are harmless. 500 U.S. at 402.

Thus, the instruction in this case was unconstitutional, as the State has conceded, and we proceed to harmless error analysis under *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993) (the test for harmless error is whether it had a "substantial and injurious effect or influence" upon the jury) and *O'Neal v. McAninch*, 115 S. Ct. 992 (1995) ("grave doubt" about harmlessness of error to be resolved in favor of petitioner).[1] The defendant's theory of defense was that the killing occurred by accident as a result of a struggle over the gun, a theory inconsistent with malice. Accident was the only defense. In both law and common sense, accident and malice are conceptually incompatible. A "malicious accident" is an oxymoron. The instruction to presume malice from the unrefuted

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[1] In *O'Neal* the Supreme Court quoted with approval the following test of harmless error from the earlier case of *Kotteakos v. United States*, 328 U.S. 750 (1946):

> If, when all is said and done, the [court] is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand. . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

328 U.S. at 764-5, *quoted in O'Neal*, 115 S. Ct. at 995.

facts of an unlawful killing and the use of a deadly weapon essentially told the jury to reject petitioner's claim that the shooting was accidental. By thus destroying defendant's theory of accident at the outset, the malice instruction substantially and injuriously affected the verdict, resulting in prejudice to the defendant.

The State argues that this instruction was mere harmless error because the jury independently found premeditation, deliberation and willfulness, elements inconsistent with accident:

> Houston's jury was instructed on each of the elements of first-degree murder separately and was told that the State must prove *each one* of them beyond a reasonable doubt. Given these instructions, a juror could have "bootstrapped" the presumption of malice into findings of premeditation, deliberation and willfulness only by disregarding the instructions.

State Reply Brief at 8 (emphasis in original). We agree with Houston's counter-argument that the malice instruction had the effect of telling the jury to presume

> that the killing was subjectively contemplated beforehand – and thus that the killing was *not* accidental – [which] utterly wiped out Mr. Houston's single and, on the evidence, substantial *accident* defense. Because accident would have negated not only malice but also willfulness, premeditation, and deliberation, removing the accident defense unconstitutionally left Mr. Houston with *no* defense, and paved the way to a finding of all four mental elements.

Defendant's Supplemental Brief at 5 (emphasis in original). The instruction that the jury should presume

that Houston had knowledge that death would follow his actions established not only malice but the initial intent or design element in premeditation, deliberation and willfulness.

What also makes the instruction harmful is that it probably led the jury to accept the prosecutor's theory argued repeatedly and vigorously that Houston robbed the owner in the office of the gas station and then "marched" him around to the bathroom and "executed" him. This scenario is doubtful in light of evidence that the gas station was probably closed and locked before the robbery. Yet with the accident defense out of the case because of the presumption, the only theory left before the jury was the State's execution theory. The State's theory that Houston emptied the cash register in the office and then marched the victim to the bathroom is now in doubt, but the instruction that the jury should presume "express or implied malice" suggested to the jury that the State's theory was probably true. The prosecutor in closing argument used the presumption of malice effectively to include the other elements of first degree murder as well:

> [A]nybody that goes down there and arm robs a human being with a deadly weapon and then shoots them in whatever fashion is guilty of First Degree Murder, of premeditated, malicious, deliberate, willful, unlawful, premeditated murder.

T.T. 596. Thus, we believe the error was harmful, and the order of the District Court issuing the writ of habeas corpus on this ground is affirmed.

III. THE "HEINOUS, ATROCIOUS OR CRUEL" INSTRUCTION

Tennessee is a "weighing" state – that is, the jury determines whether any aggravating circumstances have been established beyond a reasonable doubt by the State and then balances this against any mitigating circumstances found by the individual jurors. If the jury unanimously finds that the aggravators outweigh the mitigators, death *must* be imposed.

In this case, the trial judge instructed the jury on aggravating circumstances in part:

> No death penalty shall be imposed but upon a unanimous finding by the jury that one or more of the following specified statutory aggravating circumstances have been proved on the trial and/or on the sentence hearing beyond a reasonable doubt:
>
> [ ]The murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind.

T.T. 683. This was the whole of the instruction given the jury regarding the "heinous, atrocious or cruel" aggravator, and the jury found this aggravator as a basis for the death penalty. Under the cases cited in the opening section of this opinion, this instruction was constitutional error, and the State concedes the instruction to be erroneous in this case.

Even if there were no other error in this case, we could not allow the death sentence to stand. The remedy for such constitutional violations respecting aggravating circumstances is set out in *Richmond v. Lewis*, 113 S. Ct.

528 (1992), a case directly in point. There the Arizona trial court gave a similar "especially heinous, cruel or depraved" instruction. The federal district court and the court of appeals denied relief, and the Supreme Court reversed:

> Where the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state appellate court or some other state sentencer must actually perform a new sentencing calculus, if the sentence is to stand.
>
> * * *
>
> We reverse the judgment of the Court of Appeals and remand with instructions to return the case to the District Court to enter an order granting the petition for a writ of habeas corpus unless the State of Arizona within a reasonable period of time either corrects the constitutional error in petitioner's death sentence or vacates the sentence and imposes a lesser sentence consistent with law.

113 S. Ct. at 535, 537.

The State courts in Tennessee have not found this instruction to constitute error and therefore have not performed "a new sentencing calculus" in this case. *Thus,* the District Court was correct in its order issuing the writ of habeas corpus on this ground.

IV. THE ROBBERY CONVICTION

The District Court also vacated petitioner's armed robbery conviction on two separate grounds: the prosecution's comments in closing argument which Houston

claims make direct reference to his failure to testify and his shackling during a part of the trial. Assuming without deciding that the District Court correctly analyzed these claims, we decline to grant the writ of habeas corpus insofar as it applies to the armed robbery conviction because the errors were harmless.

The District Court applied the harmless error standard set out in *Chapman v. California*, 386 U.S. 18 (1967), which the Supreme Court has now held inapplicable to habeas petitions. *Brecht*, 113 S.Ct. at 1721. The old *Chapman* standard calls upon the State to show beyond a reasonable doubt that an error did not affect the jury's deliberations. As noted previously, the proper standard now is whether the error had a "substantial and injurious effect or influence" upon the jury's verdict. *Id.* at 1722.

It is clear in this case that these two alleged errors did not have a substantial and injurious effect or influence upon the jury's deliberations concerning the petitioner's guilt of armed robbery. Houston's role in the armed robbery was basically undisputed. His confession was fully corroborated by other evidence. The only "evidence" in this case supporting petitioner's innocence of the armed robbery is his plea of "not guilty." He was caught immediately after the event in possession of money and checks taken in the robbery. Accordingly, the petitioner's conviction and sentence on the armed robbery charge should be reinstated, and the District Court's order issuing the writ on this ground is reversed.

Accordingly, the order and judgment of the District Court issuing the writ of habeas corpus is vacated except as to the two grounds stated in Sections II and III of this

opinion as to which the District Court is affirmed, and the case is remanded to the District Court for modification of its writ of habeas corpus as provided in this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

RICHARD HOUSTON, Petitioner,	)	
v.	)	No. 3:86-0749
MICHAEL DUTTON, Warden, Tennessee State Penitentiary, Respondent.	)	

MEMORANDUM

Pending before the Court is Petitioner's Amended Motion for Summary Judgment and Immediate Relief on Seven Claims (Doc. No. 149) and Respondent's Cross Motion for Partial Summary Judgment (Doc. No. 155). On April 12, 1994, the Court heard oral argument on these motions.

Petitioner Richard Houston ("Petitioner" or "Mr. Houston") contends that consideration of the following seven claims justify the grant of the writ of habeas corpus. The claims refer to: (i) the jury instruction for malice (Petition for Writ of Habeas Corpus, Doc. No. 1, Claim No. 36); (ii) insufficiency of the evidence to support a guilty verdict for first degree murder (*id.*, No. 37); (iii) prosecutorial comments on Petitioner's silence (*id.*, No. 40); (iv) the shackling of Petitioner during trial (*id.*, No. 49); (v) the jury charge on aggravating circumstance of "heinous, atrocious, or cruel" (*id.*, No. 31); (vi) the

absence of a jury instruction on the effect of non-unanimity (*id.*, No. 30); and (vii) the denial of the parole ineligibility instruction (*id.*). Mr. Houston asserts that with respect to these seven claims there are no issues of material fact and that he is entitled to judgment as a matter of law. Petitioner moves this Court to issue the writ of habeas corpus unless the State grants him a new trial for armed robbery and murder at which the State is required to prove its case beyond a reasonable doubt, the jury is required to decide the case on its factual merits, and he is sentenced consistent with law.

In his motion Respondent, Michael Dutton, ("Respondent" or "the State") by and through the Attorney General of Tennessee, moves this Court to grant partial summary judgment in his favor with respect to the same issues presented in Petitioner's motion.

For the reasons stated below, the Court grants Petitioner's motion for summary judgment and denies Respondent's cross motion for partial summary judgment.

I. BACKGROUND

A. Procedural History

On November 3, 1978, in the Criminal Court of Knox County, Tennessee, Petitioner was convicted of the first degree murder and armed robbery of Stanley Balsinger. Mr. Houston was sentenced to death by electrocution for the murder and life imprisonment for armed robbery. The Tennessee Supreme Court affirmed the Petitioner's convictions and sentences on January 7, 1980. *Houston v.*

State, 593 S.W.2d 267 (Tenn. 1980). The United States Supreme Court denied a petition for a writ of certiorari on October 6, 1980. *Houston v. Tennessee*, 449 U.S. 891, 101 S. Ct. 251, 66 L. Ed. 2d 117 (1980). The United States Supreme Court also denied Petitioner's petition for rehearing of the denial of the petition for a writ of certiorari on December 15, 1980. *Houston v. Tennessee*, 449 U.S. 1067, 101 S. Ct. 797, 66 L. Ed. 2d 612 (1980).

Mr. Houston filed a Petition for Post-Conviction Relief in the Criminal Court of Knox County, Tennessee on March 13, 1981 and filed an amended petition on March 26, 1981. The amended petition presented forty-three grounds for relief from Mr. Houston's convictions and sentences. The Criminal Court of Knox County dismissed the petition as amended on October 21, 1982.

Petitioner filed a Motion for a New Trial and/or to Alter and Amend the Judgment on November 19, 1982. The Criminal Court of Knox County denied the motion on January 28, 1983. Petitioner filed a Notice of Appeal to the Tennessee Court of Criminal Appeals on January 28, 1983. Petitioner appealed from the trial court's ruling on all of the claims in the Post-Conviction Petition. The Court of Criminal Appeals affirmed the trial court's denial of post-conviction relief on November 8, 1984. Petitioner filed a Petition for Rehearing on November 17, 1984, which was denied by the Court of Criminal Appeals on December 14, 1984.

Mr. Houston filed an Application for Permission to Appeal from the Court of Criminal Appeals of Tennessee to the Supreme Court of Tennessee on February 12, 1985. The Application sought review of the denial of all of the

claims in Mr. Houston's Post-Conviction Petition. The Tennessee Supreme Court denied the application on April 8, 1985. On July 8, 1985, the Tennessee Supreme Court denied Mr. Houston's Petition for Rehearing of the Denial of his Application for Permission to Appeal (dated April 17, 1985) and his Supplemental Petition for Rehearing (dated June 4, 1985).

The United States Supreme Court denied Mr. Houston's Petition for Writ of Certiorari (dated September 6, 1985) and Petition for Rehearing from the denial of the same on June 2 and June 30, 1986, respectively. *Houston v. Tennessee*, 476 U.S. 1164, 106 S. Ct. 2291, 90 L. Ed. 2d 731 (1986); 478 U.S. 1014, 106 S. Ct. 3321, 92 L. Ed. 2d 728 (1986).

Subsequent to these proceedings in the state and federal courts, Mr. Houston filed the subject Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 on August 29, 1986 challenging the legality of his confinement and death sentence. The State answered the Petition on July 22 and October 7, 1988. On March 7, 1989, Mr. Houston filed a Motion for Summary Judgment on Certain Claims. The State never responded to the twenty-eight claims presented in that motion.

Mr. Houston filed the motion under consideration. The purpose of this Amended Motion for Summary Judgment was to present "a limited number of claims that are susceptible to immediate disposition . . . and that, either individually or in the aggregate, would, if granted, afford Petitioner all the relief he seeks and thus dispose of the case." Agreed Scheduling Order, Doc. No. 122 ¶ 3.

On November 24, 1992, during the proceedings in this Court on the petition for writ of habeas corpus, petitioner filed in the Tennessee Supreme Court a motion to recall the latter court's mandate that issued after the denial of the petition for Writ of Certiorari by the United States Supreme Court arising from his direct appeal in *Houston v. State*, 593 S.W.2d 267 (Tenn. 1980). Petitioner premised his motion to recall on the grounds that the opinion issued by the Tennessee Supreme Court in his direct appeal had been overruled by *State v. Brown*, 836 S.W.2d 530 (Tenn. 1992). On March 11, 1993, the Tennessee Supreme Court found petitioner's motion to recall was without merit and denied it.

B. Facts

Pursuant to 28 U.S.C. § 2254(d), the federal courts should presume a trial or appellate court's statement of facts is correct unless the petitioner shows by convincing evidence that the facts are erroneous. *Sumner v. Mata*, 455 U.S. 591, 597, 102 S. Ct. 1303 71 L. Ed. 2d 480 (1982). (per curiam). This presumption of correctness only applies to basic, primary or historical facts, and not to mixed questions of law and fact. *Levine v. Torvik*, 986 F.2d 1506, 1514 (6th Cir. 1993), *cert. denied*, ___ U.S. ___, 113 S. Ct. 3001, 125 L. Ed. 2d 694 (1993).

On April 21, 1978 at approximately 7:15 p.m., Stanley Balsinger's body was found in the restroom of the service station he operated in Knoxville, Tennessee. *Houston*, 593 S.W.2d at 269. The victim's wallet and receipts of the business were missing. *Id.* Detectives determined that Mr. Balsinger was shot three times, once in the mouth, once in

the heart, and once in the upper abdomen. *Id.* The latter two wounds were powder marked and slugs were found on the floor beneath Mr. Balsinger's body near the exit wounds, indicating that the victim was lying on his back on the floor of the restroom when two shots were fired into him at close range. *Id.*

Kenneth Hill, the customer of the service station who found Mr. Balsinger's body, described the man and the automobile he saw leaving the station. *Id.* Based on the description Mr. Houston was apprehended by detectives of the Knoxville Police Department. *Id.* Mr. Balsinger's wallet, credit card receipts, and the gun used to kill the victim were found in Mr. Houston's car. *Id.* During the search of the car, Mr. Houston attempted to pass secretly a roll of money to his companion. *Id.* Taking possession of the money and finding several bills stained with blood, the detectives formally placed Mr. Houston under arrest. *Id.*

In his statement to the police officers, Mr. Houston stated that the robbery was a spur-of-the-moment action and described the events as follows: Mr. Balsinger had grabbed the gun, Mr. Houston attempted to escape, and the gun went off accidentally in the struggle. *Id.* Mr. Houston admitted to taking a billfold from Mr. Balsinger's pocket after the shooting. *Id.* at 269-70.

Mr. Houston was tried for the murder and armed robbery of Stanley Balsinger on November 2-3, 1978. The trial court appointed University of Tennessee Law Clinic instructor Roger Moore to represent Petitioner. Mr. Moore had been a member of the bar for approximately six months, had no felony trial experience, and had never

participated in a capital case. Post Conviction Oral Arg. at 99-100, 341. Dissatisfied with the appointment of Mr. Moore, in August 1978, Mr. Houston retained Franklin Parks to represent him. Trial Tr. at 70. The day before trial, Mr. Parks was fatally shot. Trial Tr. at 70. The trial court denied Mr. Houston's renewed motion to continue based upon the need to retain new counsel and Mr. Moore's admission to the court of being unprepared to defend Petitioner. Trial Tr. at 607, 11-12, 69-74.

In Tennessee, a trial for first degree murder is a bifurcated proceeding. In the first proceeding, the jury determines the defendant's guilt or innocence of the charge. If the defendant is found guilty of first degree murder, a separate proceeding is held before the same jury to decide whether the sentence imposed will be life imprisonment or death. At the second proceeding, any evidence relevant to the punishment may be presented and can include proof with respect to aggravating and mitigating circumstances.

The jury found Mr. Houston guilty of armed robbery and first degree murder. For armed robbery, he was sentenced to life. For first degree murder, the jury sentenced Petitioner to death, finding no mitigating circumstances and three aggravating circumstances, namely: (i) the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind; (ii) the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest, and (iii) the murder was committed while the [Petitioner] was committing robbery. Technical R. 61-62.

II. STANDARD OF REVIEW

A. Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides in part that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

The Advisory Committee for the Federal Rules has noted that "[t]he very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Fed. R. Civ. P. 56 advisory committee's note.

An alleged factual dispute existing between the parties is not sufficient to defeat a properly supported summary judgment motion; there must be a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). The substantive law involved in the case will underscore which facts are material and only disputes over outcome determinative facts will bar a grant of summary judgment. *Id.* at 248, 106 S. Ct. at 2510.

The dispute must also be genuine. The facts must be such that if they were proven at trial, a reasonable jury could return a verdict for the non-moving party. *Id.* The disputed issue does not have to be resolved conclusively in favor of the non-moving party, but that party is required to present some significant probative evidence which makes it necessary to resolve the parties' differing

versions of the dispute at trial. *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-89, 88 S. Ct. 1575, 1592, 20 L. Ed. 2d 569 (1968).

In considering plaintiff's allegations, the Court is mindful of the fact that the relevant review is not whether the evidence unmistakably favors plaintiff or defendants, but whether a fair-minded jury could return a verdict in plaintiff's favor based on the evidence presented. *Anderson*, 477 U.S. at 252, 106 S. Ct. at 2512.

Although the moving party bears the initial burden of proof for its motion, the party that opposes the motion has the burden to come forth with sufficient proof to support its claim, particularly when that party has had an opportunity to conduct discovery. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). It is true, however, that "[i]n ruling on a motion for summary judgment, the court must construe the evidence in its most favorable light in favor of the party opposing the motion and against the movant. Further, the papers supporting the movant are closely scrutinized, whereas the opponent's are indulgently treated." *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425, 427 (6th Cir. 1962) (citations omitted).

To determine if a summary judgment motion should be granted, the court should use the standard it would apply to a motion for a directed verdict under Rule 50(a) of the Federal Rules of Civil Procedure. *Anderson*, 477 U.S. at 250, 106 S.Ct. at 2511. The court must determine that a reasonable jury would be unable to return a verdict for the non-moving party in order to enter summary judgment. *Id.* at 249, 106 S. Ct. at 2511. Thus, "[w]here the

record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' " *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989) (citations omitted).

B. Exhaustion of State Remedies

A petition for a writ of habeas corpus may not be granted unless the petitioner has exhausted the remedies available in state court. 28 U.S.C. § 2254(b). Exhaustion of state remedies requires a petitioner to have presented the substance of his claims to the state courts. *Castille v. Peoples*, 489 U.S. 346, 349, 109 S. Ct. 1056, 1059, 103 L. Ed. 2d 380 (1989). The exhaustion requirement is normally satisfied when the highest court in the state in which petitioner was convicted has been given a full and fair opportunity to rule on all of petitioner's claims. *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990). The petitioner bears the burden of proof to establish that his claims have been exhausted. *Darr v. Burford*, 339 U.S. 200, 218-19, 70 S.Ct. 587, 94 L. Ed. 2d 761 (1950) *overruled on other grounds by Fay v. Noia*, 372 U.S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963).

For a claim to be "fairly presented" for exhaustion purposes, petitioner must have presented to the state courts the same claim under the same theory before raising it in a habeas petition. *Pillette v. Foltz*, 824 F.2d 494 (6th Cir. 1987). Once a claim is fairly presented, the exhaustion requirement is met, regardless of whether the state courts address and dispose of it. *Rudolph v. Parke*, 856 F.2d 738, 739 (6th Cir. 1988) (citations omitted).

Unless an exception applies, a petition must be dismissed for lack of exhaustion if it contains at least one issue which was not presented to the state courts so long as a remedy is still available for the petitioner to pursue in the state courts. *Rose v. Lundy*, 455 U.S. 509, 518-20, 102 S. Ct. 1198, 1205, 71 L. Ed. 2d 379 (1982).

In a case in which there is "either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner", the exhaustion doctrine does not apply. 28 U.S.C. § 2254(b). In other words, a dismissal for failure to exhaust state remedies presumes that remedies are still available for the petitioner to pursue. For example, if a prisoner fails to present his claims to a state court and he is now barred from pursuing relief in that court, his petition should not be dismissed for lack of exhaustion because there are simply no remedies available for him to exhaust.

When no remedy is available and new claims are asserted, the court should determine whether cause and prejudice exist to excuse the failure to present the claims in the state courts. *Teague v. Lane*, 489 U.S. 288, 297-98, 109 S. Ct. 1060, 1068, 103 L. Ed. 2d 334 (1989).

Petitioner's second, third, fifth, sixth, and seventh claims have been properly presented to the state courts of Tennessee in satisfaction of the exhaustion requirement. Pet.'s Dir. App. Brf. to Tn. S. Ct. in *Houston v. State*, 593 S.W.2d 267 (Tenn. 1980), May 30, 1979 at 45-46, 61-62, 63-65, 68-70, 81-84, 84-85; Appl. for Permis. App. to Tn. S. Ct., Feb. 12, 1985 at 32, 70, 114. At issue is whether Petitioner's first and fourth claims have been waived for

failure to raise on appeal. Resp't's. Cross Mot. Summ. J., Doc. No. 155 at 15.

Although the State presents exhaustion as a basis to dismiss Petitioner's first and fourth claims, Respondent contradicts himself by conceding that the exhaustion requirement no longer applies to Petitioner's first and fourth claims because the presentation of such claims in a state post-conviction proceeding would be barred by the statute of limitations imposed by Tennessee Code Annotated Section 40-30-102. *Id.* at 15, 16. Further, as to Petitioner's first claim, the Criminal Court of Appeals merely stated that the trial court determined that the claim on the malice instruction was waived, but actually disposed of the issue. On this claim, the Court of Criminal Appeals ruled that "this issue is without merit." Court of Criminal Appeals opinion in *Houston v. State,* Knox County, C.C.A. No. 912, at pp. 39-41; *see also,* Pet.'s Dir. App. Brf. to Tn. S. Ct. in *Houston v. State,* 593 S.W.2d 267 (Tenn. 1980), May 30, 1979 at 45-46. With respect to Petitioner's fourth claim, the claim on shackling during trial, this claim has been presented to the Tennessee Supreme Court and is therefore exhausted. Appl. for Permis. App. to Tn. S. Ct., Feb. 12, 1985 at 119.

C. Procedural Default

The state prisoner's failure to comply with an independent and adequate state procedural rule results in him defaulting, i.e., losing review of, his federal claims in state court. *Coleman v. Thompson,* 501 U.S. 722, ___, 111 S. Ct. 2546, 2565, 115 L.Ed. 2d 640 (1991). For example, a

procedural default occurs when a petitioner fails to present an issue to a state appellate court at his only opportunity to do so, but nevertheless currently has no state remedy available by which to raise the claim. *Teague*, 489 U.S. at 297-98, 109 S. Ct. at 1068. Here, the State argues that Petitioner has failed to present his shackling claim and his claim regarding the jury charge on malice to the state courts. Resp't's. Cross Mot. Summ. J., Doc. No. 155 at 15.

In the instant case while there is no exhaustion problem, Petitioner will not be allowed to present claims never before presented in the state courts unless he can show actual prejudice to his defense at trial or on appeal. *Teague*, 489 U.S. at 298-99, 109 S. Ct. at 1068-69. Where no remedy is available and new claims are asserted, the court must determine whether cause and prejudice exist to excuse the failure to present the claims in the state courts. *Id.* at 297-98.

To apply the cause and prejudice test, initially there must be a firmly established state procedural rule which is applicable to petitioner's claim and the petitioner must not have complied with the rule. *Warner v. United States*, 975 F.2d 1207, 1213-14 (6th Cir. 1992) *cert. denied*, ___ U.S. ___, 113 S. Ct. 1314, 122 L. Ed. 2d 702 (1993). If the state has no applicable rule, there is no default. *Harris v. Reed*, 489 U.S. 255, 263, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989).

At the time of Mr. Houston's direct appeal, there was no "state procedural rule . . . applicable to petitioner's claim." *Warner* at 1213-14. At the time of Mr. Houston's appeal, which was decided on January 7, 1980, Tennessee

Code Annotated Section 40-3409[1] provided that the filing of a cognizable criminal appeal in the Tennessee Supreme Court automatically brought all errors in the case before the high court, regardless of whether the error was discussed in the appellant's brief on appeal. Under Section 40-3409, the Tennessee Supreme Court was " '*bound* to consider any errors in the record, whether there has been an assignment or not.' " *Miller v. State*, 584 S.W.2d 758, 760-61 (Tenn. 1979) (emphasis in original) (quoting *Adams v. State*, 547 S.W.2d 553, 557 (Tenn. 1977) (citing Tenn. Code Ann. § 40-3409)).

The State cannot establish that the petitioner failed to comply with any state procedural rule that applied to his claim. On the contrary, the Tennessee Supreme Court was obligated to correct any constitutional infirmities apparent from the trial record. Hence, there was no procedural default and this Court will reach the merits of Petitioner's claims.

D. Retroactivity

A decision which announces a new rule is not to be applied retroactively to convictions that have already become final when the decision is announced, unless the new rule falls within one of two narrow exceptions.

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[1] Tennessee Code Annotated Section 40-3409 provides in part:

> [N]o assignment of error . . . is necessary in criminal cases taken to the Supreme Court, but the court shall render such judgment on the record as law demands.

Tenn. Code Ann. § 40-3409 (1978 Supp.), repealed, 1981 Laws, ch. 499, § 1(13).

Graham v. Collins, ___ U.S. ___, 113 S. Ct. 892, 897, 122 L. Ed. 2d 260 (1993). A decision announces a new rule if it "breaks new ground," "imposes new obligations on the states or federal government," or was not "*dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301, 109 S. Ct. at 1070 (emphasis in original).

Two exceptions to the *Teague* rule, however, permit the retroactive application of a new rule whenever: (i) the rule places certain kinds of primary private individual conduct beyond the power of the criminal law-making authority to proscribe, or otherwise prohibits imposition of a certain type of punishment for a class of defendants because of their status or offense; or (ii) the new rule announces a new "watershed" rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. *Graham*, ___ U.S. at ___, 113 S. Ct. at 903.

The State relies on *Teague v. Lane*, 489 U.S. 288, 297-98, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) to assert the defense of nonretroactivity. Respt's. Cross Mot. Summ. J., Doc. No. 155 at 18-19, 46, 52, 61, 70, 75, 80, 87. The State contends that based on *Teague*, Mr. Houston is not entitled to the benefit of any rule of law which has been announced since his case became final on direct appeal on January 7, 1980. *Id.* at 18-19.

"A State can waive the *Teague* bar by not raising it." *Schiro v. Farley*, ___ U.S. ___, 114 S. Ct. 783, 788-89, 127 L. Ed. 2d 47 (1994) (citing *Godinez v. Moran*, 509 U.S. ___, ___, n.8, 113 S. Ct. 2680, 2685, n.8, 125 L. Ed. 2d 321 (1993)). In

Schiro, the Supreme Court did not reach the *Teague* argument because of the State's failure to argue this defense previously. Similarly, here, the Court rules that the State has waived the nonretroactivity defense and declines to address the State's *Teague* argument. *Id.*

The Agreed Scheduling Order governing this motion provided that "Respondent's memoranda and briefs filed pursuant to this Order . . . shall be limited to . . . defenses previously pleaded in the answer filed July 22, 1988 (as supplemented by [two later documents])." Agreed Scheduling Order, Doc. No. 120 ¶ 9; *see also* Order, Doc. No. 141 (permitting the Court to adjudicate pleaded *Teague* defenses). The final sentence of Paragraph 9 defines "defenses" as "some reason other than the constitutional merits of the claim." This definition includes nonretroactivity. Because the State has never asserted a nonretroactivity defense as to any of the seven claims under consideration, Paragraph 9 explicitly waives that defense.

III. DISCUSSION

In construing the evidence in its most favorable light in favor of the party opposing the motion for summary judgment and against the movant, as required under *Bohn Aluminum & Brass Corp.*, 303 F.2d at 427, the Court finds that with respect to Petitioner's seven claims there are no genuine issues of material fact in dispute. The facts upon which Petitioner's motion for summary judgment are adequately set forth in the record and are not in controversy. Petitioner is entitled to relief as a matter of law. Mr. Houston's convictions of armed robbery and first degree murder and the imposition of the death penalty were

unconstitutional and hence this Court vacates the death sentence imposed by the state court and remands this case to the State of Tennessee for further proceedings not inconsistent with this opinion.

Claim 1: The Jury Charge on Malice

Mr. Houston argues that the jury instructions unconstitutionally relieved the State of the burden of proving malice, an element of the crime of first-degree murder, and required him to disprove it in violation of *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979). The State contends that Petitioner urges this Court to misapply *Sandstrom*.

The instruction at issue is as follows:

> If the State proves beyond a reasonable doubt that a killing has occurred, it is presumed to be malicious unless rebutted by other facts and circumstances to the contrary. . . . The use of a deadly weapon by the party killing, when shown, raises a presumption of malice sufficient to sustain a charge of Second Degree Murder unless it is rebutted by other facts and circumstances to the contrary.

Trial Tr.[2] at 602-603 (emphasis added).

Sandstrom is controlling here. In that case, the petitioner was charged with "deliberate homicide" and the

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[2] Trial Transcript refers to the Bill of Exceptions in *State of Tennessee v. Richard Houston*, Case No. C-5870 (Knox County Criminal Court, Div.II, Nov. 2-3, 1978).

trial court's instruction to the jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts" was held invalid because the charge violated the Fourteenth Amendment requirement that the State prove every element of a crime beyond a reasonable doubt. *Id.* at 512, 524, 99 S. Ct. at 2453, 2459. The Sandstrom Court concluded that "[t]he fact that a reasonable jury could have given the presumption conclusive or persuasion-shifting effect means that we cannot discount the possibility that the jurors actually did proceed upon one or the other of these latter interpretations." *Id.* at 519, 99 S. Ct. at 2456-57. The conclusive presumption is unconstitutional because it conflicts with the presumption of innocence. *Id.* at 523, 99 S. Ct. at 2459. Likewise the burden-shifting presumption is unconstitutional. *Id.* at 524, 99 S. Ct. at 2459.

The State correctly points out that "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten*, 414 U.S. 141, 146-47, 94 S. Ct. 396, 400, 38 L. Ed. 2d 368 (1973) (overruled on different grounds). "[T]his does not mean that an instruction may never rise to the level of constitutional error." *Id.* at 147, 94 S. Ct. at 400.

The instant case is distinct from *Naughten*. In *Naughten*, the Supreme Court reasoned that the instruction in question was valid because it "neither shift[ed] the burden of proof nor negate[d] the presumption of innocence." Here, the charge *did* shift the burden to Houston and undermine the presumption of innocence. In *Naughten* the jury was charged that every witness is presumed to speak the truth, but that the presumption could be

overcome. *Id.* at 142, 94 S. Ct. at 398. Whereas the instruction in *Naughten* was a general presumption of truthfulness charge accompanied by an instruction informing the jurors that the presumption could be rejected, *id.* at 149, 94 S. Ct. at 401, in the instant case, the charge spoke to a specific essential element, malice, which the state had the burden of proving beyond a reasonable doubt.

In *Yates v. Evatt*, 500 U.S. 391, ___, 111 S. Ct. 1884, 1891-92, 114 L. Ed. 2d 432 (1991), the Supreme Court applied the *Sandstrom* analysis to a malice presumption instruction similar to the one at issue here and invalidated it. The trial court had instructed the jury that "malice is implied or presumed" both from the "willful, deliberate, and intentional doing of an unlawful act" and from the "use of a deadly weapon." *Id.* at ___, 111 S. Ct. at 1889. Notwithstanding the fact that the presumptions were rebuttable, the charge was unconstitutional because "the mandate to apply them remained, as did their tendency to shift the burden of proof on malice from the prosecution to the petitioner." *Id.* at ___, 111 S. Ct. at 1892 (footnote omitted).

The jurors at Mr. Houston's trial were governed by a similar charge. The State did not have to prove malice because the burden was shifted to Houston and the jury was told to presume malice. This Court finds that under the reasoning of both *Sandstrom* and *Yates*, the instruction on malice given in Petitioner's trial was violative of due process. As a result of the charge at Houston's trial, the State was unconstitutionally relieved of the responsibility of proving guilt for first degree murder beyond a reasonable doubt and the burden of persuasion was shifted from the State. *See also, Phillips v. Rose*, 690 F.2d 79 (6th

Cir. 1982); *McDonald v. Tennessee*, 486 F. Supp. 550 (M.D. Tenn. 1980); *State v. Brown*, 702 S.W. 2d 560 (Tenn. 1985) *overruled on different grounds by State v. Brown*, 836 S.W.2d 530 (1992).

Assignments of error under *Sandstrom* are subject to the harmless-error standard of *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). *Rose v. Clark*, 478 U.S. 570, 582, 106 S. Ct. 3101, 3108, 92 L. Ed. 2d 460 (1986). Under *Chapman*, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 24, 87 S. Ct. at 828. Applying *Chapman* to a case of an erroneous malice instruction, the Supreme Court reasoned: "[w]hen the verdict of guilty reached in a case in which *Sandstrom* error was committed is correct beyond a reasonable doubt reversal of the conviction" does not promote the goal of "ensur[ing] that only the guilty are criminally punished." *Rose*, 478 U.S at 580, 106 S. Ct. at 3107.

The Court of Criminal Appeals held that the instruction in Petitioner's case was constitutional and therefore, did not apply harmless-error analysis. Court of Criminal Appeals opinion in *Houston v. State*, Knox County C.C.A. No. 912, at 40. The Tennessee Supreme Court did not address the issue. *Houston v. State*, 593 S.W.2d 267 (Tenn. 1980).

Applying the harmless-error standard under *Chapman*, this Court finds that the error in Mr. Houston's case cannot be deemed to have been harmless beyond a reasonable doubt.

Here, the record indicates that the existence or absence of malice was at the crux of the State's case against Petitioner for first-degree murder. Whether the killing was accidental or malicious was central in the testimony as well as the closing arguments. Trial Tr. at 578-79, 596 (prosecution's summation); *id.* at 586-87, 590-91 (defense's summation). The evidence in this case did not overwhelmingly prove Petitioner's intent such that it was unnecessary for the jury to rely on the erroneous presumption in finding malice. This Court finds that the jury may have relied on the invalid presumption and moreover, such reliance grievously harmed Mr. Houston.

A conviction for first degree murder in Tennessee requires malice (intent to harm) and evidence of accident negates malice. *Martin*, 702 S.W.2d at 562-63. At trial the State failed to present evidence of malice. Detective George Crawley admitted that Mr. Houston's post-arrest record did not indicate intent:

> Q. Is there anything in that statement that indicates that before he got to that Gulf Station he had any intent to kill Mr. Balsinger?
>
> A. No, sir.
>
> Q. Nothing in the statement that indicates he planned to murder anybody at that gas station?
>
> A. No, sir.
>
> Q. Isn't it a fact, Detective Crawley, that the statement reflects that the reason there was a killing was because there was a struggle

for the gun, isn't that what the statement indicates?

A. That's what the defendant stated.

Q. And that's what the statement indicates, correct?

A. Yes, sir.

Trial Tr. at 558-59.

Further, the only other witnesses called by the State to testify about the circumstances of the killing stated that the physical evidence at the scene was consistent with Petitioner's description of an unintentional killing during a struggle over a gun. Dr. John Evans, pathologist, testified as follows:

Q. I believe also you testified, Dr. Evans, that you didn't know what position Mr. Balsinger was in when he was shot, isn't that correct?

A. That is correct, yes, sir.

Q. I believe you testified that there was scorching or smudging [around the bullet wounds] that would indicate a close contact?

A. That is my opinion, yes, sir.

Q. Would you also agree that close contact wound like that would be consistent with a struggle?

A. With what?

Q. With a struggle between two men in which a shooting could occur?

A. Yes, sir I suppose it could.

Trial Tr. at 481; *accord id.* at 468-69 (testimony of ballistics expert Steve Chauncy that the physical evidence "is consistent with the possibility of a struggle for the gun.").

In light of the absence of evidence establishing intent, this Court cannot state that the erroneous malice presumption was harmless. Based on the record, it is not the case that "the force of the evidence presumably considered by the jury . . . [was] so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the presumption." *Yates*, 500 U.S. at ___, 111 S. Ct. at 1893-94.

Further, even if the evidence was sufficient to convince a properly instructed jury that the requisite intent to harm was present, this fact would not establish that the charge that told jury to presume malice was harmless. *See Satterwhite v. Texas*, 486 U.S. 249, 258-59, 108 S. Ct. 1792, 1798, 100 L. Ed. 2d 284 (1988) (applying this test to the erroneous admission of a doctor's testimony). To establish harmlessness the State has the burden of showing not that the evidence is sufficient to support a death sentence, but rather must show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24, 87 S. Ct. at 828. The invalid charge constituted harmful error and Mr. Houston is entitled to habeas corpus relief on this issue.

Claim 2: Proof of Premeditation and Deliberation

Mr. Houston contends that the State failed to prove premeditation and deliberation in his killing of Mr. Balsinger and instead relied on the presumption of the Petitioner's use of a gun and the fact of his victim's death. Consequently, Petitioner claims that his conviction for first degree murder cannot stand because it violates *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (holding that the Due Process Clause forbids criminal conviction except upon proof beyond a reasonable doubt). The State asserts that the requisite elements of first degree murder were proven by a reasonable doubt at trial.

Where the sufficiency of the evidence is challenged, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979) (citation omitted). The inquiry does not ask the Court if *it* believes that the evidence established guilt beyond a reasonable doubt. *Id.* (quoting *Woodby v. Immigration & Naturalization Service*, 385 U.S. 276, 282, 87 S. Ct. 483, 486, 17 L. Ed. 2d 362 (1966)) (emphasis added by Court). On direct appeal, the Tennessee Supreme Court found that the evidence presented at trial was sufficient to establish the finding of guilt by the jury. *Houston*, 593 S.W.2d at 273.

This Court concludes that a review of the record in the light most favorable to the prosecution reveals that a rational factfinder could not have found the Petitioner

guilty beyond a reasonable doubt of first degree murder under Tennessee law. It is undisputed that Petitioner fatally shot Mr. Balsinger. The issues in contention at trial were whether there was sufficient evidence to establish premeditation and deliberation. These elements are to be analyzed under applicable Tennessee law. *See Jackson*, 443 U.S. at 325, 99 S. Ct. 2792 (question at trial must be "gauged in light of applicable [state] law defining the element").

Mr. Houston was convicted pursuant to Tennessee Code Annotated Section 39-2402(a), which stated that first-degree murder required intention (also called wilfulness or malice), premeditation, and deliberation. Tenn. Code. Ann. § 39-2402(a) (1978 Supp.) "From the beginning," the law of Tennessee has required that the State prove these elements. *State v. Brown*, 836 S.W.2d 530 (Tenn. 1992) (citing *Dale v. State*, 18 Tenn. (10 Yer.) 551, 552 (1837)). In determining the existence of premeditation, the critical query is "was the mind, at that moment, so far free from the influence of excitement . . . as to be capable of reflecting and acting with a sufficient degree of coolness and deliberation of purpose" to accomplish the killing. *State v. Brown*, 836 S.W. at 539 (quoting *Lewis v. State*, 40 Tenn. (3 Head) 127, 148 (1859)). Deliberation requires that the killing be done with "coolness and reflection." *Id.*

The State argued in its appellate brief that Petitioner killed Mr. Balsinger with premeditation and deliberation based on the fact that the victim was shot three times. Brief for the State of Tennessee on Direct Appeal, at 37. The Tennessee Supreme Court adopted this theory: "A circumstance from which the inference of premeditation

may be drawn is repeated shots or blows inflicted upon the victim." *Houston*, 593 S.W.2d at 273. The Tennessee Supreme Court noted that in this case "the only circumstance relied upon by the majority to establish premeditation and deliberation was the fact that the victim had sustained 'repeated shots or blows.' " *State v. Brown*, 836 S.W.2d at 542 (quoting *Houston v. State*, 593 S.W.2d 267, 273 (Tenn. 1980)).

In *Brown* the Tennessee Supreme Court reasoned that repeated shots were insufficient to establish first degree murder and concluded that only if the shots were inflicted with premeditation and deliberation could the shots prove first degree murder. The Brown court overturned a first degree conviction and death sentence and stated that: "[c]ertainly, more than the mere fact of 'repeated blows' must be shown to establish first-degree murder, and to the extent that the opinions in *Houston* and *Martin* can be read to hold otherwise, they are expressly overruled." *Id.* at 543.

Under Tennessee law, a rational juror may not, beyond a reasonable doubt, "infer premeditation from the [number] of shots fired at the victim" because *State v. Brown*, 836 S.W.2d 530 (Tenn. 1992), applying long-standing definitions of premeditation and deliberation, overturned all prior precedent permitting that inference. *Houston v. State*, 593 S.W.2d 267 (Tenn. 1980) (upholding Petitioner's conviction) falls within the category of cases overturned in *Brown*.

The State's evidence fell short as a matter of law of the constitutional minimum needed to convince a rational juror beyond a reasonable doubt that the killing was

premeditated and deliberate. Based on the record, the trial court could not have found beyond a reasonable doubt that the Petitioner had the requisite premeditation and deliberation to kill Mr. Balsinger. Accordingly, this court vacates Petitioner's death sentence.

Claim 3: Prosecution's Comments on Petitioner's Silence

Petitioner asserts that he was unconstitutionally penalized for exercising his Fifth Amendment right not to testify. Mr. Houston contends that the assistant district attorney commented on his right not to testify in violation of the Fifth and Fourteenth Amendments. The State argues that the prosecutor's comments may not be fairly construed as remarks on Petitioner's Fifth Amendment right to remain silent.

Prosecutorial comments on silence unconstitutionally penalize a defendant's exercise of the constitutional right not to testify. *Griffin v. California*, 380 U.S. 609, 615, 85 S. Ct. 1229, 1233, L. Ed. 2d (1965); *Raper v. Mintzes*, 706 F. 2d 161, 164 (6th Cir. 1983). Notwithstanding the impropriety of the statements, comments by the prosecution by themselves will not justify reversal of a criminal conviction obtained in an otherwise fair trial. *United States v. Young*, 470 U.S. 1, 11-12, 105 S. Ct. 1038, 1044, 84 L. Ed. 2d 1 (1985). The statements must be scrutinized within the context of the trial to determine whether the prosecutor's conduct undermined the fairness of the trial and prejudiced the petitioner. *Id.*

The instant case is distinct from *Young*. In *Young*, the defense counsel's inappropriate comments elicited an

improper response from the prosecution and neither attorney made a timely objection to the comments at trial. *Id.* at 4-5, 105 S. Ct. at 1040-41. Here, Petitioner's counsel did not provoke the prosecution with an impermissible argument, rather the prosecution made them on his own volition. Further, defense counsel objected to the prosecution's closing argument at trial and moved for a mistrial. Trial Tr. at 593. The trial judge overruled the objection and denied the motion. *Id.*

Evaluating the prosecutor's statements in light of the facts of this case, the Court rules that the prosecutor's statements constituted comments on the Petitioner's failure to testify in violation of the Fifth Amendment and those comments compromised the fairness of the trial.

In *Griffin* the Supreme Court reversed a first degree murder conviction and death sentence when a prosecutor made comments similar to those made in the case at bar. In *Griffin* the prosecutor remarked on the defendant's failure to take the stand, listed questions that the defendant could have answered had he taken the witness stand, and expressed sorrow that the victim could not reveal what occurred. *Id.* at 610-611, 85 S. Ct. at 1231. Here, the prosecutor's argument followed the same pattern:

> [Mr. Balsinger] was executed by this man who sits before you today as he sat there during the course of this trial. . . .
>
> . . . .
>
> Why did he take the gun out? Why did he go in with a gun? Why did he do all these other things? Why did he tell Pam Taylor "I killed

> him?" . . . There's nobody to testify in this trial that saw what happened. But are you going to let the defendant get away with it?
>
> . . .
>
> . . . There's one person in this courtroom that could stand up and say, 'I believe in capital punishment. I killed Stanley Balsinger.' He didn't afford him any constitutional guarantees. He killed Stanley Balsinger. So are you going to punish the victim in this case?

Trial Tr. 593, 596-98. These direct comments are analagous to the prosecution's argument in *Griffin*. Further, the comments asked the jury to penalize the defendant for not testifying and not confessing. Like the argument in *Griffin*, the prosecution's argument here is unconstitutional.

The Supreme Court of Tennessee ruled that the prosecutor's argument could not be deemed a comment on Mr. Houston's failure to testify and if it could be characterized as such, the error was harmless. *Houston*, 593 S.W. 2d at 273. Although the Tennessee Supreme Court concluded that the prosecution's comments amounted to harmless-error, *id.*, the court's opinion does not reveal that the court conducted harmless-error analysis. Recitation of the standard under *Chapman* does not suffice to establish that an error is harmless. *Eberhardt v. Bordenkircher*, 605 F. 2d 275, 278 (6th Cir. 1979) (finding constitutional error harmful where lower courts did not explain their findings of harmless error). Accordingly, this Court declines to accept the Tennessee Supreme Court's finding that the prosecution's comments constituted harmless-error.

Where a direct comment on a criminal defendant's failure to testify is made, the court must reverse unless the State can prove that the error was harmless beyond a reasonable doubt. *Raper*, 706 F. 2d at 164. The burden on the State to establish harmless error is a heavy one. *Eberhardt*, 605 F. 2d at 279. Here, the State has not met its burden. The State argues that because the trial court explicitly instructed the jury about Petitioner's right not to testify, Trial Tr. at 619, no harm occurred.

This Court rejects the State's argument. The trial court did not give a "strong, prompt curative instruction to the jury" immediately after the improper references to the defendant's silence were made "admonishing it to disregard the prosecutor's comments." *Eberhardt*, 605 F.2d at 280. Such a prompt charge may "render an error harmless." *Id.* The trial court's boilerplate instruction later in the trial charging jurors not to draw inferences from defendant's refusal to testify, Trial Tr. at 619; however, did not have this curative effect. Thus, the error was harmful.

The absence of a prompt curative instruction is but one factor that supports this Court's finding of harmful error. The fact that Mr. Houston's trial was not otherwise error-free also weighs in favor of finding harmful error. Because harmless error analysis under *Chapman* asks whether the defect affected the result of the trial, "whether the trial was otherwise relatively error-free is important." *Eberhardt*, 605 F. 2d at 279; *see also United States v. Smith*, 500 F. 2d 293, 297 (6th Cir. 1974) (concluding that "prejudice may be magnified by the cumulative effect of repeated improper conduct"). As this Court has already determined, Mr. Houston's trial was tainted by

an unconstitutional jury charge on malice and the State's failure to prove premeditation and deliberation.

Moreover, this Court cannot deem the prosecutor's comments as harmless because the prosecutor repeatedly referred to the defendant's silence in his closing argument. *See Griffin*, 380 U.S. at 610-611, 85 S. Ct. at 1231; *see also Chapman*, 386 U.S. at 26, 87 S. Ct. at 829 (finding harmful error in part because the prosecutor commented on silence of the defendants several times).

The Court, having found that the prosecutor's comments were comments on the defendant's right to remain silence [sic] in violation of the Fifth and Fourteenth Amendments and being unable to state that such error was harmless beyond a reasonable doubt, concludes that habeas corpus relief is required.

Claim 4: Shackling of Petitioner During Trial

Mr. Houston claims that requiring him to appear in front of the jury shackled to his chair with his hands cuffed behind his back violated his right to a fair trial because it undermined the presumption of innocence and improperly suggested to the jury that he was dangerous, violent, or unruly. Petitioner argues that he was handcuffed without any evidence that he was dangerous or disruptive, but only because he attempted to exercise his right to absent himself from trial.

The burden of proof is on the Petitioner that his constitutional rights were violated by manacling. *Kennedy v. Cardwell*, 487 F.2d 101, 111-12 (6th Cir. 1973), *cert. denied*, 416 U. S. 959, 94 S. Ct. 1976, 40 L. Ed. 2d 310

(1974). The standard is whether the trial court abused its discretion in ordering Petitioner manacled. *Id.* at 110. Sound discretion means "discretion that is not exercised arbitrarily or wilfully, but with due regard to what is right and equitable under the circumstances the law." *Woodards v. Cardwell*, 430 F.2d 978, 982 (6th Cir. 1970) *cert. denied*, 401 U.S. 911, 91 S. Ct. 874, 27 L. Ed. 2d 809 (1971).

Defendant should not be shackled during his trial before a jury except in extraordinary circumstances. *Kennedy*, 487 F.2d at 111. Manacling is permitted as a means to prevent the defendant from escaping, to protect those present in the courtroom, and to maintain order during trial. *Woodards*, 430 F.2d at 982. Precipitously shackling a defendant when less drastic security measures will suffice is an abuse of discretion. *Kennedy*, 487 F.2d at 111.

Mr. Houston was handcuffed during the opening session of his two-day trial. Under *Kennedy*, the rationale for the handcuffing should be included in the record. *Id.* at 107. The trial judge stated his reasons for manacling Petitioner as follows: "the Court's consideration of the motion of Defense counsel to allow him to stay out of the courtroom during the proceedings is overruled. Likewise, in view of his physical demonstrations in resisting being seated in his chair, the Court orders that the handcuffs will stay on." Trial Tr. at 335. The judge instructed the jury that the shackling of Mr. Houston was not relevant to the determination of his guilt or innocence. Trial Tr. at 337.

The trial judge made this decision subsequent to a motion by defense counsel that Petitioner be allowed to remain in his cell. *Id.* at 333-34. Further, Mr. Houston also

expressed to the trial judge, albeit improperly, of his desire to withdraw from the courtroom:

> Let the record show that I don't want to be present in these proceedings and watch my life pass away from me, and I'm innocent of any crime in this case. It has already been shown that – what's going to happen. These are just legal formalities. Why don't you just take me out and have me shot or killed or something?
>
> . . .
>
> I do not want to be present in any of the proceedings.

Trial Tr. at 329; *accord id.* at 336.

This Court concludes that the Petitioner has sustained the burden of proof in this matter and has established that his constitutional rights were violated by the shackling. "When a defendant is tried in shackles before a jury it is inherently prejudicial or prejudicial per se." *Kennedy*, 487 F.2d at 107, 110. As such, shackling is only permitted when an essential state interest is implicated. *Illinois v. Allen*, 397 U.S. 337, 344, 90 S. Ct. 1057, 1061, 25 L. Ed. 2d 353 (1970). This Court finds that in the absence of such an interest, shackling the Petitioner denied him of a fair trial by undermining the presumption of innocence in violation of the Due Process Clause of the Fourteenth Amendment.

The trial judge abused his discretion in manacling Petitioner because the compelling circumstances that justify shackling during trial and render the practice constitutional were not present in Mr. Houston's case. There was no evidence to indicate that Mr. Houston was an

escape risk or harm to those in the courtroom. *See Allen*, 397 U.S. at 344, 90 S. Ct. at 1061 (holding in a case of a disruptive defendant that shackling is a last resort). Moreover, Petitioner presented the trial court with the less prejudicial alternative of being absented from the proceedings. Petitioner's request eliminated the need for the judge to choose between involuntarily withdrawing the defendant's constitutional right to be present at trial, or forcibly shackling the defendant in violation of the right to a fair trial. *See Illinois v. Allen*, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970) (defendant simultaneously demands to stay in the courtroom and while there disrupts the proceedings).

There was no reason to deny Mr. Houston's request to withdraw from the courtroom when he waived his Sixth Amendment right to be in the court room during his trial. *Taylor v. U.S.*, 414 U.S. 17, 19, 20, 94 S. Ct. 194, 195, 196, 38 L. Ed. 2d 174 (1973) (*per curiam*) (voluntary failure to appear in court waives the right to be present). Petitioner's waiver of his right to be present removed the only possible objection to the court's use of removal as a less prejudicial alternative to shackling. By rejecting Mr. Houston's request to absent himself and shackling the defendant, the trial court violated his constitutional right to a fair trial. Having ruled that the shackling was constitutional error, the Court must determine if the error was harmless under *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). *State v. Thompson*, 832 S.W.2d 577, 581 (Tenn. Crim. App. 1991). The Tennessee Supreme Court did not address Petitioner's shackling claim and therefore, no harmless-error analysis was undertaken. *Houston v. State*, 593 S.W.2d 267 (1980).

Under the circumstances, this Court rules that the trial judge's abuse of discretion in having the Petitioner shackled amounted to harmful error. As opposed to the less obtrusive means of restraint of leg irons, Mr. Houston's hands were cuffed behind his back. Thus, the way in which Petitioner was shackled maximized the prejudice against him. As the Court has already noted, there was no legitimate state interest justifying the shackling. Further, the method employed by the court to restrain Mr. Houston was neither inconspicuous nor considered the dignity and comfort of the Petitioner.

The right of the Petitioner to the "physical indicia of innocence," *Kennedy*, 487 F.2d at 104, was unconstitutionally denied and this Court cannot state beyond a reasonable doubt that the presence of Mr. Houston in handcuffs at trial did not affect the outcome of the trial. Further, the State has not persuaded this Court that the constitutional defect did not contribute to the jury's verdict. Petitioner is entitled to habeas corpus relief.

Claim 5: Vagueness of the "Heinous, Atrocious or Cruel" Instruction

Petitioner claims that he is entitled to habeas corpus relief upon the jury's determination that the murder was "especially heinous, atrocious, or cruel in that it involved torture or depravity of mind." Tenn. Code Ann. § 39-2-203(i)(5) (1978 Supp.). Mr. Houston contends that the State committed Eighth Amendment error when it premised his death sentence on such language because it is facially vague and wholly undefined.

The death penalty "may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." *Godfrey v. Georgia*, 446 U.S. 420, 427, 100 S. Ct. 1759, 1764, 64 L. Ed. 2d 398 (1980). A capital sentencing scheme must "provide a 'meaningful basis for distinguishing the few cases in which the penalty is imposed . . . ' [and] must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.' " *Godfrey*, 446 U.S. at 427-28, 100 S. Ct. at 1764-65 (citations omitted).

When a federal court reviews a state court's application of an individual statutory aggravating or mitigating circumstance in a specific case, the court "must first determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer." *Walton v. Arizona*, 497 U.S. 639, 654, 110 S. Ct. 3047, 3057, 111 L. Ed. 2d 511 (1990). A statutory aggravating circumstance is unconstitutionally vague "if it fails to furnish principled guidance for the choice between death and a lesser penalty." *Richmond v. Lewis*, 506 U.S. ___, 113 S. Ct. 528, 534, 121 L. Ed. 2d 411 (1992). When a jury is the sentencing body, "it is essential that the jurors be properly instructed regarding all facets of the sentencing process." *Walton*, 497 U.S. at 653, 110 S. Ct. at 3057. In a "weighing" state such as Tennessee, where aggravating and mitigating circumstances are balanced against each other, "it is constitutional error for the sentencer to give weight to an unconstitutionally vague

aggravating factor, even if other, valid aggravating factors obtain." *Lewis*, 506 U.S. at ___, 113 S. Ct. at 534.

If a statutory aggravating circumstance is unconstitutionally vague, a federal court must "determine whether the state courts have further defined the vague terms." *Walton*, 497 U.S. at 654, 110 S. Ct. at 3057. If the state courts have done so, the federal court must then determine whether the definitions are constitutionally adequate, such that they "provide *some* guidance to the sentencer." *Id.* A state appellate court may thus cure the taint caused by reliance on an unconstitutionally vague aggravating circumstance by adopting an adequate narrowing construction. *Lewis*, 506 U.S. at ___, 113 S. Ct. at 534.

Under Tennessee's capital sentencing scheme, a jury at a sentencing hearing is required to weigh certain statutory aggravating factors against any mitigating factors. *See State v. Dicks*, 615 S.W.2d 126, 131 (Tenn. 1981), *cert. denied*, 454 U.S. 933, 102 S. Ct. 431, 70 L. Ed. 2d 240 (1981). The jury is then instructed that it shall impose the death penalty if the aggravating factors outweigh the mitigating factors. *Id.*; *see also* Trial Tr. at 684; Technical R. at 61.

The "heinous, atrocious or cruel" aggravating circumstance fails to provide a constitutional premise for the imposition of the death penalty. *See e.g., Maynard v. Cartwright*, 486 U.S. 356, 363-66, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988) (holding Oklahoma's "especially heinous, atrocious, or cruel" instruction unconstitutionally vague); *Shell v. Mississippi*, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990) (invalidating Mississippi's "especially heinous, atrocious, or cruel" instruction where "heinous" was

defined as "extremely wicked or shockingly evil"). Likewise, the Tennessee Supreme Court held the "heinous, atrocious or cruel" circumstance unconstitutional unless the terms are defined to guide the jury so they can determine whether the aggravating circumstances have been proven by the State. *State v. Williams*, 690 S.W.2d 517, 533 (Tenn. 1985).

In *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), the Supreme Court reasoned that a "torture or depravity of mind" charge could be constitutionally permissible if the sentencer applying the charge did not "adopt such an open-ended construction" that would allow the death penalty to be applied in any murder case. *Id.* at 201, 96 S. Ct. at 2938. This Court finds that when a jury is the sentencer further limiting instruction must be provided to avoid an unconstitutional "open-ended construction." *See Williams*, 690 S.W.2d at 533. Without such restricting language, the words "torture or depravity of mind" fail to impose "any inherent restraint on the arbitrary and capricious infliction of the death sentence." *Godfrey*, 446 U.S. at 428, 100 S. Ct. at 1765.

The jury at Mr. Houston's trial found him guilty of murder in that "the murder was especially, heinous, atrocious or cruel in that it involved torture or depravity of mind." Technical R. at 61. This finding was based on the trial judge's charge to the jury with the same language. Trial Tr. at 683-84. The terms "heinous," "atrocious," "cruel," "torture," and "depravity of mind" were not defined by the trial court. The Tennessee Supreme Court affirmed without defining the aggravating circumstance. *Houston*, 593 S.W.2d at 276.

The Court finds that this instruction is unconstitutionally vague. *Maynard v. Cartwright*, 486 U.S. 356, 363-66, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988). The "torture or depravity of mind" language does not correct the constitutional infirmity as this Court also finds that language unconstitutionally vague. Because the jury was not given adequate definitions of "heinous," "atrocious," "cruel," "torture," and "depravity of mind," it was a constitutionally forbidden and "basically uninstructed jury." *Godfrey*, 446 U.S. at 429, 100 S. Ct. at 1765. Such a jury cannot lawfully impose the death penalty. *Williams*, 690 S.W.2d at 533.

The State committed Eighth Amendment error when it premised Houston's death sentence on the facially vague and wholly undefined "heinous, atrocious, or cruel" circumstance. In a weighing state such as Tennessee, a state appellate court may cure the constitutional error in sentencing by either relying on an adequate narrowing instruction and reweighing the aggravating and mitigating circumstances, or by applying harmless-error analysis. *See Lewis*, 506 S. Ct. at ___, 113 S. Ct. at 534; *Stringer v. Black*, 503 U.S. ___, ___, 112 S. Ct. 1130, 1136, 117 L. Ed. 2d 367 (1992). In the absence of one of these cures by the state appellate courts, the sentence must be vacated.

The constitutional defect was not cured in Mr. Houston's case because these words were not defined before Petitioner's trial and appeal, at his trial, or on his appeal. Further, it does not appear that the Tennessee Supreme Court engaged in a proper reweighing of the aggravating and mitigating circumstances. In affirming

Petitioner's death sentence and addressing his vagueness challenge the court stated the following:

> As to the charge that the statute is vague because of it allowing the jury to "weigh" aggravating and mitigating circumstances, it must be borne in mind that the weighing of evidence is the normal function of the jury. And, where the jury is given adequate guidance as to what to consider, the requirement that the jury weigh aggravating and migrating [sic] factors shown by the evidence does not make the statute vague and, consequently, unconstitutional.

Houston, 593 S.W. 2d at 277. Apparently, the Tennessee Supreme Court concluded that the jury was given "adequate guidance" and no reweighing was required. This Court has determined that the jury was not sufficiently guided and thus reweighing was necessary. Because a proper reweighing was not conducted, the constitutional error in Mr. Houston's sentencing was not cured.

Moreover, the opinion of the Tennessee Supreme Court fails to reveal that the court undertook harmless-error analysis. *Houston v. State*, 593 S.W.2d 267 (1980). The Court finds that the statute is unconstitutionally vague and Petitioner's sentence is vacated and the case is remanded for a redetermination of Mr. Houston's sentence.

Claim 6: Unanimity Instruction

Mr. Houston claims that his rights under the Eighth and Fourteenth Amendments were violated by the trial court's failure to instruct the jury of the effect of non-

unanimity and the option to recommend life imprisonment. Consequently, the jury was swayed into making an easy decision in favor of death.

In *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), the Supreme Court invalidated discretionary death sentencing procedures because they imposed capital sentences in an arbitrary and unintelligible way. *See id.* at 249-51, 92 S. Ct. at 2731-32 (Douglas, J.); *id.* at 9. 92 S. Ct. at 2754 (Brennan, J.); *id.* at 309-310, 92 S. Ct. a. 762 (Stewart, J.); *id.* at 311-13, 92 S. Ct. at 2763-64 (White, J.); *id.* at 364, 92 S. Ct. at 2790 (Marshall, J). States must conform to specific standards to constitutionally apply the death sentence. First, the states must avoid the "standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury." *Godfrey*, 446 U.S. at 429, 100 S. Ct. at 1765. When it is the responsibility of a jury to determine whether a death sentence is to be imposed, the jury must be properly instructed as to all aspects of the sentencing process. *Walton*, 497 U.S. at 653, 110 S. Ct. at 3057.

Second, sentencing procedures must result in the death sentence only upon the basis of rational criteria, such as retribution and deterrence, and not on the basis of whim, mistake, bias, or other irrelevant factors. *See e.g., Beck v. Alabama*, 447 U.S. 625, 637-38, 642-43, 100 S. Ct. 2382, 2389-90, 2392, 65 L. Ed. 2d 392 (1980) (invalidating charge instructing jurors to choose between convicting defendants of the most serious crime or acquitting them of any crime because it increased the risk that the death sentence would be imposed inaccurately); *Caldwell v. Mississippi*, 472 U.S. 320, 331, 333, 105 S. Ct. 2633, 2641,

2641-42, 86 L. Ed. 2d 231 (1985) (reasoning that a charge that misinformed a jury that there was automatic supreme court review of verdicts of death created a risk of inaccurate death sentences because jury believed it could err and it would be corrected on appeal).

Third, capital-sentencing jurors must be informed of and consider any mitigating evidence proffered by the defendant relating to the defendant and the offense. *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S. Ct. 2954, 2964-65, 57 L. Ed. 2d 973 (1978). This rule forbids restrictions on the introduction of mitigating evidence and instructions that impair jurors' assessment of mitigating circumstances by limiting consideration to only those mitigating factors that all twelve jurors unanimously agree are present. *Mills v. Maryland*, 486 U.S. 356, 384, 108 S. Ct. 1860, 1870, 100 L. Ed. 2d 384 (1988). For "it would be the 'height of arbitrariness to allow *or* require the imposition of the death penalty' where 1 juror was able to prevent the other 11 from giving effect to mitigating evidence." *McKoy v. North Carolina*, 494 U.S. 433, 440-41, 110 S. Ct. 1227, 1232 (1990) (quoting *id.* at 374, 100 S. Ct. at 1865) (emphasis added by Court).

The standard of review of a disputed jury instruction is " 'whether where is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle v. McGuire*, ___ U.S. ___, ___, 112 S. Ct. 475, 482, 116 L. Ed. 2d 385 (1991) (quoting *Boyde v. Claifornia* [sic], 494 U.S. 370, 380, 110 S. Ct. 1190, 1198, 108 L. Ed. 2d 316 (1990)). In both *Estelle* and *Boyde*, the Supreme Court was reviewing an "ambiguous" instruction. Here, the charge was both ambiguous and erroneous in that it misstated the relevant law. Applying

the *Boyde* standard, this Court rules it was reasonably likely that the jury in Mr. Houston's case applied the charge in an unconstitutional manner.

It was reasonably likely from the charge and the verdict form provided in Petitioner's case that the jury understood the instructions and verdict form as preventing it from considering mitigating circumstances unless there was unanimity in contravention of *Mills v. Maryland*, 486 U.S. 356, 384, 108 S. Ct. 1860, 1870, 100 L. Ed. 2d 384 (1988). Hence, the jurors were precluded from weighing "factors which may [have] call[ed] for a less severe penalty," *Lockett*, 438 U.S. at 605, 98 S. Ct. at 2965, and Mr. Houston's sentence cannot stand. Further, the Court finds that it cannot rule out the "substantial possibility that the jury may have rested its verdict on [an] 'improper' ground", *Mills*, 486 U.S. at 377, 108 S.Ct. at 1867 (footnote omitted), and we must remand for resentencing.

The capital-sentencing scheme in effect at the time of Mr. Houston's trial, Tennessee Code Annotated Section 39-2404, directed "the trial judge [to] include in [the] instructions for the jury to weigh and consider any mitigating circumstances and any of the statutory aggravating circumstances . . . which may be raised by the evidence." Tenn. Code Ann. § 39-2404(e) (1978 Supp.)[3]. The jury may reach a sentence in one of the following ways:

> 1. If the jury unanimously determines that . . . statutory aggravating circumstances

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[3] Tennessee's capital sentencing statute has been recodified. The subsections cited here generally correspond to Tennessee Code Annotated Section 39-13-204 (1991).

have been proved by the state . . . , and said . . . circumstances are not outweighed by any mitigating circumstances, the sentence shall be death. Tenn. Code Ann. § 39-2404(g).

2. If the jury unanimously determines that no statutory aggravating circumstances have been proved by the state . . . or if the jury unanimously determines that . . . statutory aggravating circumstances have been proved . . . but . . . are outweighed by one or more mitigating circumstances, the sentence shall be life imprisonment." Tenn. Code Ann. § 39-2404(f).

3. If the jury cannot ultimately agree as to punishment, the judge shall dismiss the jury and . . . impose a sentence of life imprisonment. Tenn. Code Ann. § 39-2404(h).

The latter provision indicates that each juror can individually assess the circumstances and compel a sentence less than death.

These statutory provisions stand in contrast to the actual charge given at Mr. Houston's trial:

> Our statutory law provides that the jury shall fix the punishment after a separate sentencing hearing to determine whether the defendant shall be sentenced to death or life imprisonment. Your verdict must be unanimous as to either form of punishment. Trial Tr. 682.
>
> . . . .
>
> If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances

have been proved by the State beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any sufficiently substantial mitigating circumstances, the sentence shall be death. Trial Tr. 684.

If the death penalty is the sentence of the jury, the members of the jury shall then complete the attached form entitled "Punishment of Death". . . . [T]he jury must include its finding, [sic] that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so found. Upon such unanimous finding, the members of the jury will affix his or her signature to the said written finding, and then return said written verdict to the Court. Trial Tr. 684-85.

If the jury unanimously determines that no statutory aggravating circumstance or aggravating circumstances have been proved by the State beyond a reasonable doubt, or if the jury unanimously determines that a statutory aggravating circumstance or aggravating circumstances have been proved by the State, but that said circumstance or circumstances are outweighed by one or more mitigating circumstances, the punishment shall be life imprisonment. Trial Tr. 685.

The jury's verdict form indicated that the sentence was based in part on the following: "We, the Jury unanimously find that there are no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so listed above." Technical R. 61.

The trial court denied Petitioner's objection to instructions requiring unanimity. Trial Tr. 44-45, 626; Def.'s Instr. Req. 3, App. Pet.'s Mem. Summ. J.; Def.'s Instr. Req. 4, App. Pet.'s Mem. Summ. J. Based on the aforementioned instructions, the jury imposed the death sentence. The Tennessee Supreme Court affirmed the death sentence concluding that the charge was not problematic. *Houston*, 593 S.W. at 278.

The Court finds it reasonably likely that the jury in Petitioner's case interpreted the instructions as preventing any juror from considering mitigating circumstances unless the jury agreed unanimously as to that circumstance. Hence, resentencing is necessary. *See Mills*, 486 U.S. at 384, 108 S. Ct. at 1870 (requiring resentencing where petitioner's jury may have arrived at a death verdict improperly).

The instructions at Mr. Houston's trial violated the second and third Eighth Amendment rules adopted by the Supreme Court after *Furman*. The failure to instruct on the jurors' ability to disagree and impose a sentence of life imprisonment if at least one juror favored that outcome is unconstitutional because it had the effect of favoring the imposition of death irrationally. *See Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). In *Beck* it was constitutional error to base a capital conviction and sentence on a determination by a jury improperly led to believe that its only alternative was to acquit a guilty offender. *Id.* at 630, 637, 100 S. Ct. at 2386, 2389. Similarly, in Petitioner's case, it was constitutionally impermissible to base a death sentence on a determination by jurors falsely led to believe that a failure to arrive at a unanimous decision would prevent the

jury from carrying out its duty. The effect in Mr. Houston's case was to eliminate the possibility of a sentence of life imprisonment unless there was unanimity, which is not required by Tennessee's capital sentencing statute, and irrationally favor the imposition of the death sentence.

The instructions in Mr. Houston's case also unconstitutionally "precluded [the jurors] from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." *Mills*, 486 U.S. at 384, 108 S. Ct. at 1870. *Kordenbrock v. Scroggy*, 919 F.2d 1091 (6th Cir. 1990), *cert. denied*, 499 U.S. 970, 111 S. Ct. 1608, 113 L. Ed. 2d 669 (1991), is controlling here. Habeas corpus relief was granted there because the trial court had failed to instruct the jurors explicitly that they "need not be unanimous with regard to mitigating factors." *Id.* at 1108. The court concluded that without this charge, jurors might assume that they could not give weight to mitigating circumstances unless the other eleven jurors agreed. *Id.* at 1110. A death sentence imposed in the absence of instructions authorizing non-unanimity on mitigating factors is unconstitutional:

> Because juries are likely to act as a unit in sentencing, . . . the danger of a tainted sentence [is] high where jurors are 'never expressly informed in plain and simple language that even if one juror believed that the death penalty should not be imposed, [petitioner] would not be sentenced to death.'
>
> . . .
>
> Because the jurors in this case were told that aggravating factors had to be unanimous, but

> were not told exactly what role mitigating factors play, it would have been reasonable for them to assume that mitigating factors had to be found unanimously as well.

Id. at 1109-10 (quoting *Kubat v. Thieret*, 867 F.2d 351, 373 (7th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S. Ct. 206, 107 L. Ed. 2d 159 (1989)).

Had the jury in *Kordenbrock* understood that one juror could have blocked the death sentence the court could be more certain that the "jur[y] carr[ied] out [its] role[] properly." *Id.* at 1110. Similarly, the jury in Mr. Houston's case was not informed of the effect of non-unanimity and the trial court's failure to inform jurors that they could individually consider mitigating circumstances left uncertainty as to the propriety of the imposition of the death penalty. Even worse the jurors were instructed that they had to find mitigating factors unanimously and that the verdict had to be unanimous as to the imposition of a death sentence or a sentence of life imprisonment.

By misinforming the jury about state law the trial judge skewed deliberations in favor of death and forbade individual jurors to consider mitigating factors unless all twelve jurors agreed on their existence and weight. Consequently, the Court finds that the instructions at Mr. Houston's trial violated the Eighth and Fourteenth Amendments and vacates Petitioner's death sentence.

Claim 7: Denial of the Parole Ineligibility Instruction

Petitioner argues that by refusing to inform the jury that a life sentence would make him ineligible for parole for 30 years, the trial court kept him from rebutting the

State's case and subjected him to unreliable death sentencing in violation of due process and the Eighth Amendment.

"Accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision." *Gregg*, 428 U.S. at 190, 96 S. Ct. at 2933. Moreover, "the sentencer may not refuse to consider . . . 'any relevant mitigating evidence.' " *Skipper v. South Carolina*, 476 U.S. 1, 4, 106 S. Ct. 1669, 1671, 90 L. Ed. 2d 1 (1986) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 114, 102 S. Ct. 869, 877, 71 L. Ed. 2d 1 (1982)).

Under Tennessee law if the jury had sentenced Mr. Houston to life imprisonment, he would not have been eligible for parole for thirty years, until the year 2008, when he would have been 63 years old. *See* Tenn. Code ann. §§ 39-2404(f), 40-3613 (1978 Supp.) Petitioner asked the trial court to inform the jury of Tennessee's mandatory thirty-year term prior to parole:

> I charge you that in your deliberations on the question of punishment you are to presume that if you sentence the Defendant to life imprisonment, that the Defendant will spend at least 30 years in the State penitentiary before being eligible for parole, and that you are to presume that if you sentence the Defendant to death that he will be electrocuted until dead. You are to make no other presumptions.

Def.'s Instr. Req. 5, App. Pet.'s Mem. Summ. J; *see also* Def.'s Instr. Req. 8, App. Pet.'s Mem. Summ. J. The trial court denied the request.

During the sentencing phase, the jurors were instructed that, "[t]he offense of murder in the first degree is punishable by death by electrocution; or by imprisonment for life." Trial Tr. at 682. The State argued against a prison sentence:

> I believe that society and our community . . . has a right to defend itself against people like Mr. Houston, self defense. And I ask you to sentence Mr. Houston to death by electrocution in that self-defense against Mr. Houston, to prevent him from doing this again. . . . [Rev. Lewis] just testified [for the defendant] that others might look in and maybe pick out a life sentence. I don't believe that would be a deterrent, ladies and gentlemen. I honestly do not believe that would be a deterrent. The only [penalty for] someone that goes in and robs a person and kills him has to be death by electrocution in our society. . . . That is the only way that our society can protect ourselves. It is the only way, ladies and gentlemen.

Supp. Trial Tr. 390-91.

The State's argument directly addressed the issues of imposing a punishment commensurate with the crime and the protection of society. Because Mr. Houston's jury charge indicating that he would not be eligible for parole for thirty years was rejected, Petitioner was prevented from rebutting the State's argument.

Skipper is analogous to the case at hand. There, the Supreme Court held that the trial court violated the defendant's right to due process by excluding evidence of the defendant's record of good behavior in jail while awaiting trial when the prosecutor had argued that the

defendant would misbehave in prison. *Id.* at 5 n.1, 106 S. Ct. at 1671 n.1. In *Skipper,* the Supreme Court found a violation of "elemental due process" when the defendant's behavior for two months in jail before trial was at issue. This Court finds the reasoning of *Skipper* applicable here, where Mr. Houston's ineligibility of parole for thirty years and possibility of being a violent threat to society were before the trial court. The Supreme Court concluded that it was unconstitutional for Skipper to be denied a response to the State's claim of future dangerousness while incarcerated.

The Tennessee Supreme Court did not address Petitioner's claim that he was unconstitutionally denied the right to rebut the State's argument during sentencing. *Houston v. State,* 593 S.W.2d 267 (Tenn. 1980). This Court rules that the trial court's refusal of Mr. Houston's jury charge indicating that he would not be eligible for parole for thirty years was constitutional error. Further, this Court cannot state that such error was harmless beyond a reasonable doubt. *Chapman,* 386 U.S. at 24, 87 S. Ct. at 828.

Because the State argued that societal safety required imposition of the death sentence, the fact of Petitioner's ineligibility for parole for thirty years was information the jury required to assure the reliability of the sentencing process. The jury did not have such information, hence, this Court cannot state that the jury made "a reasoned determination of whether [the Petitioner] should live or die", *Gregg,* 428 U.S. at 190, 96 S. Ct. at 2933. Such a constitutional defect is not harmless because Petitioner's jury instruction was an element of the accurate information needed by the jurors to avoid systematic

"bias in favor of death sentences." *Caldwell*, 472 U.S. at 330, 105 S. Ct. at 2640.

Accordingly, this Court rules that Mr. Houston could not constitutionally be denied his response to the State's argument with the answer of a legally mandated thirty year sentence before parole. "[E]vidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating. Under *Eddings*, such evidence may not be excluded from the sentencer's consideration." *Skipper*, 476 U.S. at 5, 106 S. Ct. at 1671. The Court vacates Mr. Houston's death sentence.

IV. CONCLUSION

In entering a Judgment for Petitioner, the Court finds that Mr. Houston has prevailed on his claims as a matter of law. Constitutional infirmities were present at both the trial and the sentencing of Mr. Houston.

For the reasons set forth above, the Court grants Petitioner's Motion for Summary Judgment. An Order consistent with this Memorandum is filed herewith.

Entered this the 19th day of May, 1994.

/s/ John T. Nixon
JOHN T. NIXON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

RICHARD HOUSTON, Petitioner, v. MICHAEL DUTTON, Warden, Tennessee State Penitentiary, Respondent.	)	No. 3:86-0749

ORDER

Pending before the Court is Petitioner's Amended Motion for Summary Judgment and Immediate Relief on Seven Claims (Doc. No. 149) and Respondent's Cross Motion for Partial Summary Judgment (Doc. No. 155).

For the reasons set forth in the Memorandum accompanying this Order, the Court GRANTS Petitioner's motion and DENIES Respondent's cross motion. The Court VACATES Petitioner's death sentence. Further, the writ of habeas corpus shall ISSUE, unless within 120 days from the entry of this order the State affords Mr. Houston a new trial for armed robbery and first-degree murder.

Entered this the 19th day of May, 1994.

/s/ John T. Nixon
JOHN T. NIXON, CHIEF JUDGE
UNITED STATES DISTRICT
COURT

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

RICHARD HOUSTON	]	
	]	
vs.	]	No. 3:86-0749
MICHAEL DUTTON, Warden,	]	
Tennessee State Penitentiary	]	

ORDER

The Court AMENDS its previous Memorandum and Order (Doc. Nos. 171, 172) entered on May 19, 1994, to add the following:

Where the Court found violations which did not constitute harmless error, the Court made such findings according to the principles of *Brecht v. Abrahamson*, 507 U.S. ___, 113 S. Ct. 1710 (1993). Unlike *Brecht*, the State courts in the instant action failed to conduct harmless error analysis under the standard announced in *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824 (1967), before this case reached the Court on habeas review. *See* Mem., Doc. No. 171, at 20, 29, 34, 50.

Accordingly, as the first court to review the errors in this case, this Court is required to conduct harmless error analysis under *Chapman*. *See Starr v. Lockhart*, ___ F.3d ___, ___, No. 92-1466, 1994 U.S. App. LEXIS 9554, at *33-*35 (8th Cir. May 2, 1994); *Orndorff v. Lockhart*, 998 F.2d 1426, 1430 (8th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. ___, 128 L. Ed. 2d 354 (1994). The Court has thus conducted *Chapman* harmless error analysis and found that

the violations in this action did not constitute harmless error. *See* Mem., Doc. No. 171, at 20-23, 29-31, 34-35, 50-51.

Furthermore, the violations do not constitute harmless error under the standard of *Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239 (1946). Petitioner demonstrated that each violation had a "substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos*, 328 U.S. at 776, 66 S. Ct. at 1253. *See also* Mem., Doc. No. 171, at 35. Specifically, the jury was substantially and injuriously influenced by the trial court's improper malice instruction (Claim 1); the prosecutor's repeated references to Petitioner's failure to testify (Claim 3); and the trial court's rejection of Petitioner's proposed jury charge which would have instructed the jury that Petitioner was ineligible for parole for thirty years, and without which Petitioner was denied the right to rebut the State's central argument at sentencing that the death penalty was required to protect society from "people like Mr. Houston" (Claim 7). *See* Mem., Doc. No. 171, at 18-19, 28-30, 49-50.

There are also some violations which are likely to be prejudicial, but "defy analysis by 'harmless error' standards." *Brecht*, 507 U.S. at ___, 113 S. Ct. at 1717 (quoting *Arizona v. Fulminante*, 499 U.S. ___, 111 S. Ct. 1246, 1254 (1991)). Such violations are "presumed prejudicial [even] if the defendant cannot make a specific showing of prejudice." *United States v. Olano*, 507 U.S. ___, 113 S. Ct. 1770, 1778 (1993). The Supreme Court has included unconstitutional shackling in this category of violations. *See Riggins v. Nevada*, 504 U.S. ___, 112 S. Ct. 1810, 1816 (1992). Accordingly, the Court notes that the shackling of Mr.

Houston during trial (Claim 4) was inherently prejudicial. Moreover, "the way in which Petitioner was shackled maximized the prejudice against him," Mem., Doc. No. 171, at 35, and resulted in substantial harm on both convictions. *See* Mem., Doc. No. 171, at 32-35.

Finally, the Court AMENDS its May 19, 1994, Memorandum such that the last sentence of the Court's discussion of *Claim 2* (Doc. No. 171, at 26) is altered to read as follows: "Accordingly, the Court unconditionally grants the writ of habeas corpus vacating Petitioner's conviction of first-degree murder and death sentence. *See Burks v. United States*, 437 U.S. 1, 18, 98 S. Ct. 2141, 2150-51 (1978)."

The Court AMENDS the second paragraph of its May 19, 1994, Order (Doc. No. 172) to read as follows:

> For the reasons set forth in the Memorandum accompanying this Order, the Court GRANTS Petitioner's motion and DENIES Respondent's cross motion. The Court unconditionally ISSUES the writ of habeas corpus and ORDERS that Petitioner be released from incarceration under his conviction of first-degree murder and that his death sentence is VACATED. Furthermore, the writ of habeas corpus shall ISSUE, releasing Petitioner from incarceration for armed robbery and second-degree murder, unless within 120 days from the entry of this Order the State affords Mr. Houston a new trial for those offenses.

Entered this the 8th day of June, 1994.

/s/ John T. Nixon
JOHN T. NIXON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX D

[Jury Instructions, *State v. Richard Houston*, Knox County Criminal Court]

(WHEREUPON, Court charged the jury as follows, to-wit:)

THE COURT: Members of the Jury, the defendant, Richard Houston, has been charged in an indictment consisting of three counts. However, the State has previously elected to proceed only on the second and third counts of the indictment. You will not consider the first count for any purpose. It will be your duty to render a verdict as to both the second and third counts. You may convict the defendant on both counts or you may acquit the defendant on both counts or you may convict him on one count and not the other as you may determine from the law and the evidence presented.

The Second Count of the indictment in this case charges the defendant with the offense of Murder in the First Degree. This charge, however, embraces four distinct felonious homicides:

Murder in the First Degree,
Murder in the Second Degree,
Voluntary Manslaughter, and
Involuntary Manslaughter.

To this charge and each and every offense embraced therein, there has been interposed a plea of not guilty, the legal effect of which is to deny and put at issue each and every allegation of the indictment. And thus are formed the issues for your determination.

An individual commits Murder in the First Degree, as charged in the Second Count of this case if he commits a willful, deliberate, malicious, and premeditated killing. For you to find the defendant guilty of Murder in the First Degree as charged in the Second Count, the State must prove beyond a reasonable doubt:

(1) That the defendant unlawfully killed the alleged victim.

(2) That the killing was malicious.

(3) That the killing was willful. This means that the defendant must have intended to take the life of the alleged victim.

(4) That the killing was deliberate, that is, with cool purpose.

(5) That the killing was premeditated, premeditation being the principal element of this offense. This means that the intent to kill must have been formed previous to the act itself. Such intent or design to kill may be conceived and deliberately formed in an instant. It is not necessary that the purpose to kill pre-exists in the mind of the accused for any definite period of time. It is sufficient that it preceded the act, however short the interval. The mental state of the accused at the time he allegedly instigated the act which resulted in the alleged death of the deceased must be carefully considered in order to determine whether or not the accused was sufficiently free from excitement and passion as to be capable of premeditation. Passion does not always reduce the crime below Murder in the First Degree, since a person may deliberate, may

> premeditate, and may intend to kill after premeditation and deliberation although prompted and to a large extent controlled by passion at the time. If the design to kill was formed with deliberation and premeditation, it is immaterial that the accused may have been in a passion or excited when the design was carried into effect.

If you find from your consideration of all the elements that the State has proven each of the elements of First Degree Murder beyond a reasonable doubt, then you should find the defendant guilty of First Degree Murder.

If, on the other hand, you find that the State has not proven each of the elements of First Degree Murder beyond a reasonable doubt, then you will proceed to inquire whether or not the defendant is guilty of the lesser included offense of Murder in the Second Degree.

An individual commits Murder in the Second Degree if he commits a malicious killing. For you to find the defendant guilty of the lesser included offense of Murder in the Second Degree, the State must prove beyond a reasonable doubt?

(1) That the defendant unlawfully killed the alleged victim.

(2) That the killing was malicious.

Malice is an essential ingredient of murder, and it may be either express or implied. Express malice is actual malice against the party slain. Implied malice is malice not against the slain, but malice in general, or that condition of mind which indicates a wicked, depraved, and

malignant spirit, and a heart regardless of social duty and fatally bent on mischief.

If the State proves beyond a reasonable doubt that a killing has occurred, it is presumed to be malicious unless rebutted by other facts and circumstances to the contrary.

Deliberate purpose is not essential in making out the crime of Murder in the Second Degree; and although the proof may show that the defendant did design or intend to kill, still, if the design was formed upon a sudden impulse of passion, without adequate provocation and disconnected with any previously formed design, and if executed willfully and maliciously, it would be Murder in the Second Degree only. To constitute Murder in the Second Degree the proof must show that the killing was unlawful and malicious.

A deadly weapon is an instrument, which from the use made of it at the time, is likely to produce death or to do great bodily harm. The use of a deadly weapon by the party killing, when shown, raises a presumption of malice sufficient to sustain a charge of Second Degree Murder unless it is rebutted by other facts and circumstances to the contrary.

You should look to all the facts and circumstances developed by the evidence in this case to determine whether or not the State has proved beyond a reasonable doubt the existence of malice.

If you find from your consideration of all the evidence that the State has not proven each of the elements of First Degree Murder beyond a reasonable doubt, but that it has proven each of the elements of the lesser

included offense of Second Degree Murder beyond a reasonable doubt, then you should find the defendant guilty of Second Degree Murder.

. . .

Supreme Court, U.S.
FILED
JUL 3 1995
CLERK

(2)

No. 94-2111

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

MICHAEL DUTTON, WARDEN

Petitioner,

v.

RICHARD HOUSTON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Although substantial evidence supported Mr. Houston's defense that the killing occurred accidentally and not maliciously as the State claimed, the trial court twice instructed the jury to presume that the killing was malicious and not accidental. The State concedes that both instructions violated the Due Process Clause. The question presented is whether the District Court and Court of Appeals erred in finding, based on comprehensive analyses of the record, that instructions to presume the validity of the State's theory and to reject the defense had a substantial and injurious affect on the jury and were not harmless.

2. Mr. Houston was sentenced to die on the basis of a "heinous, atrocious, or cruel" aggravating circumstance that was not defined at trial or on appeal and was not supported by the evidence. The State concedes that reliance on this undefined and unsupported circumstance violates the Eighth Amendment. The question presented is whether, under the circumstances of this case, the District Court and Court of Appeals erred in holding that state and not federal courts are the proper forum to evaluate the relative strength of the remaining aggravating and mitigating circumstances following the invalidation of the heinousness circumstance.

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No. 94-2111

IN THE SUPREME COURT OF THE UNITED STATES

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RICHARD HOUSTON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent, Richard Houston, respectfully files this Brief in Opposition to the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

A. *Proceedings Below*

On May 20, 1994, the District Court granted habeas corpus relief from Mr. Houston's conviction and death sentence for murder on four grounds – burden-shifting instructions conceded by the State to violate the rule of *Sandstrom v. Montana*, 442 U.S. 510 (1979); insufficiency of the evidence under *Jackson v. Virginia*, 443 U.S. 307 (1979); prosecutorial comments on Mr. Houston's failure to testify; and the trial court's prejudicial shackling of

Mr. Houston in front of the jury. The Court also granted relief from Mr. Houston's robbery conviction and life sentence on the "comments on silence" and shackling grounds. It granted relief from Mr. Houston's death sentence on three grounds — the sentencer's reliance on the "heinous, atrocious, or cruel" aggravating circumstance, also conceded by the State to be unconstitutional, and two instructional errors.[1]

The United States Court of Appeals for the Sixth Circuit (Merritt, C.J., Guy and Ryan, JJ.) affirmed in part, reversed in part, and remanded. The Court affirmed as to the two errors the State conceded. App. 1-2, 8-14. It reversed relief from the murder conviction under *Jackson v. Virginia* and reversed all relief from the robbery conviction, ruling that any error as to the robbery was harmless under the rule of *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993). App. 3-7, 14-16. The Court "pretermit[ted]" ruling on the "comments on silence" and shackling errors as to the murder conviction and on the two instructional errors at the sentencing trial. App. 1.

The State did not seek rehearing or rehearing *en banc*.

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[1]App. 17, 70. Mr. Houston filed his habeas corpus petition on August 29, 1986. The State finally answered the petition on October 7, 1988, after twice being ordered to do so and after four extensions. App. 20; R. 4, 5, 7, 10, 14, 21, 22, 25. Mr. Houston thereupon filed a Motion for Summary Judgment and supporting memorandum, and the District Court pronounced the case "ready for immediate final resolution" once the State responded to the motion. R.32, 47, 77 (1/31/90 Mem. at 57). The State never did so. App. 20. On April 28, 1993, the State agreed to file a timely response to an updated summary judgment motion. R. 118-20. The District Court granted that motion on May 20, 1994.

"Pet." refers to the Petition for a Writ of Certiorari. "App." refers to the Appendix to the Petition for a Writ of Certiorari. "R." refers to the docket number of documents filed in the district court that are part of the record on appeal. "T." refers to the trial transcript. "Ex." refers to trial exhibits. "T.R." refers to the Technical Record of trial.

The Court of Appeals' reversal and remand necessitates further proceedings in the District Court on several fact-based claims challenging Mr. Houston's robbery conviction and life sentence. Those proceedings are governed by a scheduling order directing that evidentiary proceedings occur within short time frames. R.120, ¶¶ 4-7. Among the claims waiting to be heard are several that apply to the murder as well as the robbery conviction, including prosecutorial suppression of evidence, physically coerced confession, denial of counsel of choice when Mr. Houston was not allowed to replace his retained attorney who was killed the night before trial, and ineffective assistance by the appointed lawyer ordered to proceed in the absence of retained counsel. R.1. Over Mr. Houston's objection, further proceedings in the District Court have been suspended pending resolution of this Petition. Order, May 15, 1995.

B. The Evidence at the Guilt-Innocence Trial

Mr. Houston was tried for the malice murder and robbery of Stanley Balsinger. For tactical reasons, the State waived felony murder.[2]

Mr. Houston admitted shooting Mr. Balsinger. The issue at trial was the mental state with which the shooting occurred. The State contended that Mr. Houston maliciously "executed" Mr.

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[2]The State took on the burden of proving malice murder rather than felony murder because it doubted a jury would impose a death sentence on the facts of the case and wanted to maximize Mr. Houston's term of years by avoiding a state rule merging felony murder (but not malice murder) and the underlying felony into a single crime and sentence. T. 33, 598; T.R. 53; *Houston v. State*, 593 S.W.2d 267, 279 (Tenn. 1980) (Henry, J., dissenting).

Balsinger by shooting him in the face while he was standing and in the stomach and the chest after he fell to the floor.[3] App. 4. Mr. Houston contended "that the killing occurred by accident as a result of a struggle over the gun, a theory inconsistent with malice." App. 10, 37.

The Petition describes the evidence supporting the "prone when killed" theory. Pet. 4-8. The Court of Appeals found that evidence constitutionally sufficient but not compelling. App. 3-5, 12.

The Petition does *not* describe the evidence showing that the victim was standing and struggling over the gun when all three shots fired accidentally. The Court of Appeals found that evidence "'substantial.'" App. 11. That evidence is described below:

Kenneth Hill discovered Mr. Balsinger on the floor of the washroom. As revealed by a photograph the State introduced at trial, the victim was lying in the position of a man who had been standing in front of the sink on the rear wall of the washroom facing the door on the opposite wall and who fell forward toward the door. He was lying on his stomach, on top of all three entrance wounds. Ex. 32; T. 489.

Another photograph shows what appear to be three bullet-impact marks on the rear wall of the washroom – two on the metal frame of a mirror above the sink, 10½ wall tiles (42") above the floor; a

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[3]At trial, the State also argued that Mr. Houston robbed Mr. Balsinger in the station office and "marched" him to the washroom. App. 12. "This scenario is dubious in light of evidence that the gas station was probably closed and locked before the robbery," App. 12, and the State abandoned the theory on direct appeal and in postconviction proceedings.

third on a wall tile 2½ tiles further up (52" above the floor) and a few tiles to the right. Ex. 39.

All three bullets exited the victim's back and clothing. No bullet damage was found on the concrete floor or anywhere on the ceramic-tiled walls near the floor. None of the bullets was found underneath the victim – one was in the sink drain; another in a corner of the washroom; and a third near the victim's right biceps. T. 356-58, 476-77; Ex. 32.

All three bullets exited lower on the victim's body than they entered. A straight line connects each entry wound to a corresponding exit wound and impact mark on the wall, if the victim was standing but bent forward when the shots were fired. T.R. 20, 26; T. 478-79; Ex. 39, 42.

According to a statement signed by Mr. Houston a few hours after the killing and introduced by the State at trial, Mr. Houston went to the gas station to use a phone. As the attendant was entering the washroom, Mr. Houston asked him about the phone:

> "I noticed a green wallet sticking out of his right pocket. I just decided to take it. I had no place to live in the last week, and my ... wife and I split up. When I approached him, when I stepped towards him, I pulled a gun out of my waistband. He saw me and grabbed the pistol barrel ...."

The two men struggled for the gun – the victim, further inside the washroom, pulling the pistol towards him; Mr. Houston, closer to the door, pulling the pistol away from the victim:

> "I said, 'Man, just let me go out of the bathroom, just let me go out of the bathroom, just let me get away.' Both of us was still wrestling for the pistol. The bathroom was shut, and it was dark.... I was trying to pull the pistol out of his hand, and the pistol started going off. It started going off. It fired two, three, four times." T. 455-56.

Pamela Taylor, who drove to the gas station with Mr. Houston, testified for the State that Mr. Houston went to the station intending to use the phone, spoke of no plan to rob the station, returned to the car looking shaken and "scared," had a bloody cut on his finger that was not there when he left the car, and said that he shot the man in the filling station but was not sure he was dead. T. 518, 520, 521, 535, 548.

The detective who took Mr. Houston's statement said that "[n]othing in the statement ... indicates that [Mr. Houston] planned to murder anybody at that gas station" or "had any intent to kill Mr. Balsinger"; "the statement reflects that ... there was a killing ... because there was a struggle for the gun." App. 37-38.

The state's expert pathologist testified that, from the physical evidence, one "cannot" and he "didn't know what position Mr. Balsinger was in when he was shot"; that he would make no "attempt to [say] what order they [the wounds] were made in"; and that the "contact wound[s]" to the chest and stomach and the noncontact wound to the face were "consistent with a ... struggle between two men in which a shooting could occur." App. 38-39; T. 479, 481, 476.

The only other witness the State called to testify about the circumstances of the killing, a ballistics expert, demonstrated the pistol's sensitive trigger and tendency to fire multiple shots in rapid succession, and agreed that the evidence "is consistent with the possibility of a struggle for the gun." App. 39; T. 456-57,

468-69, 587.[4]

REASONS FOR DENYING THE PETITION

I. The Judgment Is Not Ripe for Review Because it Is Not Final

The judgment before the Court is not final. Mr. Houston's habeas petition challenges both his murder and robbery conviction and the capital and life sentences imposed for those convictions. The Court of Appeals reversed the District Court's grant of relief from the robbery conviction and remanded. On remand, evidentiary proceedings are required on the claims attacking the robbery conviction. If found meritorious, several of those claims would provide sufficient bases for invalidating the *murder* conviction as well as the robbery conviction. *See supra* p. 3.

Further proceedings in both courts below must occur before a final judgment can reach this Court. Completion of those proceedings may provide other, independently sufficient, bases for the partial relief ordered thus far and may warrant additional relief. At this point, therefore, the Court cannot review the entire case

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[4]The State (Pet. 4, 6-8) says Mr. Houston's signed statement describes a "wrestling match" after the victim was shot; the statement says the opposite — the shooting *ended* the struggle. T. 455-56. The State claims there was a "relatively wide separation of the victim's three wounds (mouth, chest, [stomach])"; however, if the victim was shot while his upper body was being pulled forward by the tug-of-war over the gun (as Mr. Houston's statement and the bullet trajectories and wall damage indicate), the entrance wounds were only a few inches apart. T.R. 20, 26. The State says the suspect "walk[ed] past" Hill; in fact, Hill was in *front* of the station and the suspect was *behind* it, 50 feet away, walking in the opposite direction, with his back to Hill. T. 490-92; Ex. 37. The State says Mr. Houston parked his car "up the street" from the station; in fact, Mr. Houston's car was parked "right behind the service station." T. 486. The State says that the force of a bullet fired by the large caliber pistol, even after passing through the victim, was "severe" enough to cause "a broken tile and bullet mark on the rear wall of the restroom"; it offers no explanation of how two large caliber bullets supposedly fired downward through the victim while he was lying on a concrete floor left no marks on the floor. Nor does it offer an explanation for two of the three impact marks on the rear wall.

or even all potential bases for the partial relief granted below. To avoid piecemeal and unnecessary proceedings, this Court treats nonfinal judgments as "not yet ripe for review" on certiorari. *Brotherhood of Locomotive Firemen & Engineers v. Bangor & Aroostock R. Co.*, 389 U.S. 327, 328 (1967) (*per curiam*). "[E]xcept in extraordinary cases, the writ [of certiorari] is not issued until final decree," and an absence of finality provides "sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). As set forth below, there is nothing about this case that warrants certiorari even from a final judgment. There certainly is nothing that makes the case sufficiently "extraordinary" to justify review in its current, *non*final posture.

II. The Legally Scrupulous, Factually Supported, and Case-Specific Determination of the Courts Below that the Jury Was Substantially and Injuriously Affected by Instructions to Presume an Element of the Offense and Reject the Accused's Defense Presents No Issue Worthy of Review

Tennessee's "definition of first-degree murder require[s] the state to prove that 'the killing [was] done ... *maliciously*, that is, with malice aforethought.'" *State v. Brown*, 836 S.W.2d 530, 538 (Tenn. 1992) (citation omitted). Malice requires an actual, subjective mental state with regard to the killing. App. 11. "Express malice" is an intent to kill the victim that is manifested by "external circumstances" such as ill will.[5] "Implied malice"

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[5] *Humphreys v. State*, 531 S.W.2d 127, 133 (Tenn. 1975) ("Express malice [is] 'a ... formed design [to] kill[] another; which formed design is evidenced by external circumstances discovering the inward intention'" (quoting *Warren v. State*, 44 Tenn. 130, 135 (Tenn. 1867)). *See Welch v. State*, 836 S.W.2d 586, 591

is a decision to engage in the fatal act notwithstanding actual, subjective "knowledge" that the act imperiled the victim's life[6] – what Tennessee law has long defined as "that condition of mind which indicates a wicked, depraved and malignant spirit, and a heart regardless of social duty and fatally bent on mischief." *Fox v. State*, 441 S.W.2d 491, 496 (Tenn. Cr. App. 1969).

The jury was so instructed at Mr. Houston's trial:

> "'Malice is an essential ingredient of murder, and it may be either express or implied. Express malice is actual malice against the party slain. Implied malice is malice not against the slain, but malice in general, or that condition of mind which indicates a wicked, depraved, and malignant spirit, and a heart regardless of social duty and fatally bent on mischief.'" App. 8 (quoting T. 602).

Applying these definitions, the Tennessee courts have repeatedly held that, absent actual proof of a subjective mental state as to the killing (*i.e.*, design, knowledge, or an actual awareness of a high risk of death), malice is *not* present even if death was caused by a *clearly unlawful act* committed in a *grossly negligent manner*.[7] As a result, the fact that a "shooting was

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(Tenn. Cr. App. 1992) ("malice ... [is] an intent to do harm or cause injury to another").

[6] *State v. Johnson*, 541 S.W.2d 417, 418 (Tenn. 1976) ("a consciously unlawful act done intentionally and with knowledge on the part of the accused that the act was directly perilous to human life"). *See State v. Randolph*, 676 S.W.2d 943, 947 (Tenn. 1984) ("conscious indifference to the consequences of [one's] ... activities").

[7] *See, e.g., State v. Martin*, 702 S.W.2d 560, 562 (Tenn. 1985) (striking victim in face with pistol did not establish malice murder if "pistol accidentally discharged," killing victim); *State v. Atkins*, 681 S.W.2d 571, 577 (Tenn. 1984), *cert. denied*, 470 U.S. 1028 (1985) (malice not present if "defendant did not intend death nor bodily harm when he shot the victim and [instead] death was accidentally caused by [the] unlawful act"); *State v. Randolph*, *supra*, 676 S.W.2d at 946-47, 948 (death caused by felonious sale of "uncut" heroin does not establish malice absent actual proof that defendant intended to kill or knew death was likely; "'death ... accidentally caused by an unlawful act' is involuntary manslaughter, not murder); *Lewis v. State*, 304 S.W.2d 322, 324-25 (Tenn. 1957)

accidental ... negate[s] the element of malice."[8] Moreover, as both Tennessee appellate courts and both federal courts below

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(proof that killing "was accidental" and occurred when "defendant ... pointed the pistol, unlawfully carried, at deceased ... make[s] him guilty of involuntary manslaughter," not malice murder); *Letner v. State*, 299 S.W. 1049, 1050 (Tenn. 1927) (unlawfully discharging gun in direction of boat with intent to scare occupants but without thinking that shot would kill one of them is involuntary manslaughter not malice murder); *Shorter v. State*, 247 S.W. 985, 986-87 (Tenn. 1923) (overturning murder conviction based on instruction to find malice if driver was exceeding lawful speed limit when fatal accident occurred; "if the motorist was running in excess of [the speed limit], without knowledge that he was endangering the lives of others, ... he would only be guilty of manslaughter"); *Lee v. State*, 41 Tenn. 62, 66-67 (1860) ("where ... neither death, or any bodily harm, was intended, but death is accidentally caused by some unlawful act," offense is manslaughter; offense is not murder unless defendant, in addition, "manifests a heart regardless of social duty" because "he saw ... the mischief likely to ensue, and yet [continued]" — *i.e.* unless the accused "deliberately saw the danger [of death], or betrayed any consciousness of it").

[8]*Phillips v. Rose*, 690 F.2d 79, 81-82 & n.5 (6th Cir. 1982) (loaded shotgun discharged when defendant beat victim with it; malice not present if "shooting was accidental"). *See State v. Martin*, *supra*, 702 S.W.2d at 562-63 (malice question is "close" where defendant admitted hitting homicide victim with loaded pistol but said "pistol accidentally discharged"); *Smith v. State*, 370 S.W.2d 543, 545 (Tenn. 1963) (accidental killing as result of intentional discharge of pistol under condition of "stress" is not malice murder); *Harper v. State*, 334 S.W.2d 933, 935 (Tenn. 1960) (malice not present if "homicide was a result of an accident"); *Mullins v. State*, 299 S.W. 1052, 1054 (Tenn. 1927) (intentionally striking victim with rifle that discharged, killing victim, was malice murder if defendant intentionally cocked gun just before striking victim, but manslaughter if not); *State v. Gore*, 1991 WL 235232, at *3 (Tenn. Cr. App. Nov. 13, 1991) (if proved, "accidental killing" negates charge that defendant "maliciously killed the victim," as where shotgun "negligent[ly]" pointed at victim fired twice due to hair trigger and defendant's having stumbled); *Brewer v. State*, 1991 WL 21605, at *8 (Tenn. Cr. App. Feb. 22, 1991) (malice negated if "shooting took place after a struggle with the victim and was accidental"); *State v. Korpan*, 1991 WL 1345, at *6, *7 (Tenn. Cr. App. Jan. 11, 1991) ("defense of accident" — "that the killing was done maliciously rather than accidentally" during an argument — may be proved by showing "abnormalities in the trigger pull of the pistol" or that victim had "come at appellant" or "threatened him by word or deed"); *State v. Bounds*, 1989 WL 92215, at *2 (Tenn. Cr. App. Aug. 17, 1989) (proof of accidental shooting in struggle over gun while defendant was attempting to collect on bookmaking debt — *e.g.*, if gun "ha[d] a hair trigger" — would negate malice); *State v. Griffin*, 1987 WL 9715, at *2 (Tenn. Cr. App. Apr. 23, 1987) (malice not present if killing was result of accidental firing of rifle during struggle); *State v. Kerley*, 1986 WL 9777, at *2 (Tenn. Cr. App. Sept. 9, 1986) (question for jury "was whether [death] was accidental or whether it was a premeditated, deliberate, malicious killing"); *State v. Sims*, 1986 WL 1040, at *2, *3 (Tenn. Cr. App. Jan. 21, 1986) (question whether malice was present turned on whether jury believed pistol discharged during "scuffle over the gun" when "'[b]oth of us was holding the gun'"); *Armes v. State*, 540 S.W.2d 279, 285 (Tenn. Cr. App. 1976) (malice murder not present if "evidence ... comport[s] with the defendant's insistence that this was an accidental shooting"); *Bailey v. State*, 479 S.W.2d 829, 834 (Tenn. Cr. App. 1972) (malice not present "if the shooting was accidental"); *Bunch v. State*, 463 S.W.2d 956, 958 (Tenn. Cr. App. 1970) (if firing of pistol was "accidental" result of "argument and struggle," malice murder not present).

found, the question whether the shooting of Stanley Balsinger was malicious (as the state contended) or accidental (as Mr. Houston contended) was the decisive issue at Mr. Houston's trial.[9]

Two instructions relieved the State of the burden of proof on this decisive issue. Both required the jury to "*presume[]*" malice unless Mr. Houston "rebutted" it.[10] As the State conceded below, both instructions violated the due process rule of *Sandstrom v. Montana*, 442 U.S. 510 (1979). Pet. 17.

After comprehensively reviewing the record (App. 3-5, 10-12, 21-23, 37-39), both courts below concluded that the invalid instructions were not "harmless" under the test of *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993), and *O'Neal v. McAninch*, 115 S. Ct 992 (1995). App. 10-13, 37, 71. As the Court of Appeals found, "[a]ccident was the only defense," and "[t]he instruction to presume malice from the unrefuted facts of an unlawful killing and

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[9] *See Houston v. State*, 593 S.W.2d 267, 269 (Tenn.), *cert. denied*, 441 U.S. 891 (1980) (State argued that Mr. Houston shot the victim twice in cold blood while the victim was prone; defense was that "the robbery was a spur-of-the-moment action, that Mr. Balsinger grabbed the gun, that [Houston] sought to break away and escape, and that the gun went off accidentally in the struggle"); *Houston v. State*, CCA No. 912 at 3 (Tenn. Cr. App. Nov. 8, 1984) (State argued that "appellant 'executed' Mr. Balsinger"; defense was that "[o]n impulse [Houston] decided to rob the owner ... [who] grabbed the barrel of the pistol and a struggle ensued. The gun then discharged accidentally, killing Mr. Balsinger"); App. 37 ("Whether the killing was accidental or malicious was central in the testimony as well as the closing arguments"); App. 12, 11 ("the prosecutor's theory argued repeatedly and vigorously [was] that Houston robbed the owner ... and then ... 'executed' him"; "defense was that the killing occurred by accident as a result of a struggle over the gun, a theory inconsistent with malice").

[10] "'If the State proves beyond a reasonable doubt that a killing has occurred, it is *presumed* to be malicious unless rebutted by other facts and circumstances to the contrary.'"

"'The use of a deadly weapon by the party killing, when shown, raises a *presumption* of malice sufficient to sustain a charge of Second Degree Murder unless it is rebutted by other facts and circumstances to the contrary.'" App. 8 (quoting T. 602-03).

the use of a deadly weapon essentially told the jury to reject petitioner's claim that the shooting was accidental." App. 10-11. "By thus destroying defendant's theory of accident at the outset, the malice instruction substantially and injuriously affected the verdict, resulting in prejudice to the defendant." App. 11.

Prejudice extended beyond the "malice" element. "[T]he malice instruction had the effect of telling the jury to presume 'that the killing was subjectively contemplated beforehand — and thus that the killing was not accidental — [which] utterly wiped out Mr. Houston's single and, on the evidence, substantial accident defense.'" App. 11 (citation and emphasis omitted). Because Mr. Houston's substantial evidence of accident could have "'negated not only malice but also willfulness, premeditation, and deliberation,'" the instructions "'removing the accident defense unconstitutionally left Mr. Houston with *no* defense, and paved the way to a finding of all four mental elements.'"[11] *Id.*

The State asks the Court to plunge into the record to see if it can find something on the harmless error issue that all four judges below missed. The State, however, offers no reason for the Court to expend its resources in this way. It points to no evidence that the courts below failed to consider. It concedes that both courts applied the proper legal standard of *Brecht* and *O'Neal*.[12] Although it baldly asserts that "the lower federal

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[11]In closing argument, the prosecutor "used the presumption of malice effectively to include the other elements of first degree murder." App. 12.

[12]Pet. 17. The Court of Appeals also applied the *Brecht* standard to deny Mr. Houston relief on two claims. App. 14-16.

courts require this court's guidance concerning the proper application of the habeas corpus harmless error standard to jury instructions containing unconstitutional mandatory rebuttable presumptions," Pet. 15, it cites *not a single lower court case* — much less one evincing confusion as to the proper application of *Brecht* in *Sandstrom* cases.[13] Nor does it explain what review here would add to the Court's recent harmless error analysis of a *Sandstrom* violation in *Yates v. Evatt*, 500 U.S. 391 (1991) — especially given that *Yates* and the instant case involve nearly the same definition of malice, the same unconstitutional instructions to presume malice, and facts as nearly identical as two cases are likely to present.[14]

What the State does, in lieu of providing any reason to grant certiorari, is to repeat the argument it unsuccessfully made below

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[13]Lower courts routinely apply the *Brecht* standard to *Sandstrom* error without difficulty or dissent. *See Anderson v. Butler*, 23 F.3d 593, 597 (1st Cir.), *cert. denied*, 115 S. Ct. 331 (1994); *Libby v. Duval*, 19 F.3d 733, 738 (1st Cir.), *cert. denied*, 115 S. Ct. 314 (1994); *Moore v. Lewis*, 1994 U.S. App. LEXIS 14231 at *2 (9th Cir. June 1, 1994); *Goodwin v. McQuen*, 1994 U.S. App. LEXIS 3439 at *3 (10th Cir. Feb. 24, 1994); *Arney v. Roberts*, 1993 U.S. App. LEXIS 27627 at *8 (10th Cir. Oct. 21, 1993); *Jacoby v. Lewis*, 1993 U.S. App. LEXIS 25544 at *2 (9th Cir. Sept. 30, 1993); *Ruff v. Kincheloe*, 1993 U.S. App. LEXIS 20160 at *4 (9th Cir. Aug. 3, 1993).

[14]In *Yates*, as here, (1) the instruction defined malice as "wickedness, ...a depraved spirit, ... a heart devoid of social duty, and fatally bent on creating mischief," *Yates v. Evatt*, *supra*, 500 U.S. at 396; (2) state law made critical the question whether the robbers killed maliciously or inadvertently, *id.* at 411; (3) the court twice instructed the jury to presume malice, *id.* at 396 ("Malice is ... presumed ... from the ... doing of an unlawful act without any just cause or excuse" and "from the use of a deadly weapon" unless "rebutt[ed] ... by the rest of the evidence"); and (4) the question whether the killing was malicious or the accidental result of a struggle over a weapon was central and pitted the defendant's account against the State's circumstantial theory, *id.* at 410-11 ("[t]here was no ... testimony on how Mrs. Wood encountered" her assailant other than the account of a "struggle" after Mrs. Wood "tried to grab" one of the robbers; the pathologist testified that the physical evidence was consistent with a stabbing in a struggle; and the defendant said he "left the [scene] not knowing whether he had, in fact, killed [the victim]").

on a record-dependent matter with no significance beyond this case. The specifics of its argument make certiorari particularly inappropriate. First, its argument is based entirely on a disagreement with the courts below on two matters of *state* law, namely, the courts' conclusions – as a matter of Tennessee law as defined at Mr. Houston's trial – (i) that accident negates malice and (ii) that malice is not established simply because death occurred as a result of an unlawful or felonious act.[15] Pet. 18-19. Second, in support of its argument, it cites *not a single Tennessee decision* – much less a decision saying that accident does not negate malice or that unlawful behavior suffices to establish malice. Third, the established law of Tennessee, reiterated in numerous decisions, is that accident *does* negate malice, and that unlawful behavior does *not* sufficiently establish that element. *See supra* pp. 9-11 & nn.7, 8.

Certiorari should be denied.

III. The Ruling Below that, on the Facts of this Case, State Courts Are the Proper Forum to Evaluate the Relative Strength of the Aggravating and Mitigating Circumstances Following the Invalidation of an Aggravating Circumstance Presents No Question Meriting Review.

The jury sentenced Mr. Houston to die after weighing the "heinous, atrocious or cruel" and two other aggravating circumstances against the substantial mitigating evidence in the case.[16]

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[15]The authors of both opinions below are experienced Tennessee jurists.

[16]Several clergy and family members testified to Mr. Houston's good character, lack of prior bad behavior, strong ties to the community, emotional and financial support for his family and children, record of continuous employment, service overseas in the military during the Vietnam War and honorable

The State concedes that reliance on the "heinousness" circumstance violated the Constitution because the Tennessee courts failed to define the facially vague terms of the circumstance at trial and on appeal, *cf. Maynard v. Cartwright*, 486 U.S. 356 (1988), and because there is no evidence based on which a rational sentencer could find that circumstance present once it is constitutionally defined, *see Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). Pet. 22; App. 2, 13.

In identical circumstances, this Court's practice has not been itself to conduct harmless error analysis but instead to remand to the State courts to reevaluate the remaining aggravating and mitigating circumstances. "Where the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the *state appellate court* or some other *state* sentencer must actually perform a new sentencing calculus, if the sentence is to stand." *Richmond v. Lewis*, 113 S. Ct. 528, 535 (1992) (emphasis added).[17] The Court of Appeals followed the Court's practice in this regard. J.A. 13-14. The State claims that the Court of Appeals' adherence to the Court's practice warrants certiorari.

Certiorari is inappropriate for four reasons. First, the State seeks a ruling that would have no affect on the case. The

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discharge, and severe emotional stress at the time of the offense due to the break up of his marriage. T. 555, 644-81; Ex. 44.

[17] *See Stringer v. Black*, 112 S. Ct. 1130, 1136-37, 1140 (1992) (rule is "well settled ... [that] use of a vague or imprecise ['heinousness'] factor in the weighing process invalidates the sentence and at the very least requires constitutional harmless-error analysis or reweighing in the *state* judicial system" (emphasis added); remanding for state proceedings notwithstanding two valid aggravating circumstances — killing during commission of a robbery and to avoid arrest); *Parker v. Dugger*, 498 U.S. 308, 321, 322-23 (1991).

Court of Appeals invalidated Mr. Houston's murder conviction – the sole basis for his death sentence. No ruling on the "heinousness" issue can alter the need for a new trial on murder and, in the event of conviction, a new trial on sentence.

Second, this case does not present the issue the State wants reviewed – whether, *assuming state law would have permitted an appellate court to approve Mr. Houston's death sentence based on harmless error review*, the federal court should supplant the state court's harmless error analysis with its own analysis, using the standard of *Brecht v. Abrahamson*, *supra*. Pet. i, 21-23. For at the time of Mr. Houston's direct appeal, Tennessee law *automatically* required *jury* resentencing when an aggravating circumstance was invalidated.[18] Under these circumstances, the case is squarely controlled by this Court's holding in *Maynard v. Cartwright*, 486 U.S. 356 (1988).

In *Maynard*, Oklahoma pointed out that, as of the time of the federal ruling, the state courts "would not necessarily set aside a death penalty where on appeal one of several aggravating

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[18]*See, e.g., Cozzolino v. State*, 584 S.W.2d 765, 768 (Tenn. 1979) ("[g]iven the nature of the [capital sentencing] issue on trial," a single invalid aggravating circumstance requires a new trial despite five valid aggravating circumstances); *State v. Pritchett*, 621 S.W.2d 127, 139 (Tenn. 1981) ("necessary to set aside the death penalty and remand ... for ... a new sentencing hearing" where court "found the proof insufficient to support [the heinousness] aggravating circumstance"; "we ... cannot speculate whether the jury would have imposed the death penalty with [one circumstance] withdrawn ... and with the necessity of weighing the remaining aggravating circumstance against the mitigating circumstances"); *State v. Moore*, 614 S.W.2d 348, 352 (Tenn. 1981); *State v. Teague*, 645 S.W.2d 392, 399 (Tenn. 1983); *State v. Miller*, 674 S.W.2d 279, 284 (Tenn. 1984). The State admits that Tennessee has only applied a harmless error rule in *State v. Howell*, 868 S.W.2d 238 (Tenn. 1993), and "in *subsequent* cases." Pet. 22 (emphasis added). *See State v. Branam*, 855 S.W.2d 563, 570 (Tenn. 1993) ("In the past, when this Court has set aside one of a number of aggravating circumstances as improperly submitted, we have generally held that the case must be remanded for a new hearing on punishment.").

circumstances had been found invalid or unsupported by the evidence" and instead would affirm if the error had no impact on the sentence. *Id.* at 365. Based on the state courts' practice, Oklahoma argued that this Court should *itself* apply harmless error analysis and let the death penalty "stand because ... one [aggravating factor] was unchallenged and is sufficient to sustain the sentence." *Id.* at 365. This Court rejected Oklahoma's argument, however, because "*[w]hen this case was decided*, ... the Oklahoma Court of Criminal Appeals would not attempt to save the death penalty when one of several aggravating circumstances was found invalid or unsupported," and because a federal court should not "undertak[e] what the state courts themselves refused to do" at the time the petitioner's sentence was reviewed. *Id.* (emphasis added). The "significance ... for the present case" of the Oklahoma courts' later decisions instituting harmless error review was "a matter for the *state* courts to decide in the first instance." *Id.* (emphasis added).

This case thus does not present the issue the State wants reviewed – which assumes that, at the time the Tennessee Supreme Court reviewed Mr. Houston's death sentence, it would have conducted harmless error review rather than remanding upon invalidation of the "heinousness" circumstance. Nor does the State ask the Court to reconsider the unanimous holding of *Maynard*, which governs in the circumstances that *are* present here. Although the State cites two cases supposedly in conflict with the decision below, both cases arose in States that, unlike Oklahoma and

Tennessee, have *always* allowed appellate courts to save death sentences imposed on the basis of an invalid aggravating circumstance without remanding for retrial.[19]

Third, the two cases the State cites do not support review of the question it proposes – even were that question actually presented here. The portion of *Smith v. Dixon*, 14 F.3d 956, 975 (4th Cir.), *cert. denied*, 115 S. Ct. 129 (1994), on which the State relies is *dicta*. Because the Fourth Circuit ruled that no federally cognizable "heinousness" error occurred, *id.* at 962-74, the case did not present the question of which forum should decide whether any cognizable error that *might* have occurred was harmless. Moreover, the Eighth Circuit in *Williams v. Clarke*, 40 F.3d 1529 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1397 (1995), did not apply the "substantial and injurious effect" harmlessness standard of *Brecht* that the State seeks here and instead applied the "harmless beyond a reasonable doubt" standard of *Chapman v. California*, 386 U.S. 18 (1967), that the State wants to keep the Tennessee courts from applying.[20]

Finally, the State concedes that, when state law requires an appellate court "to reweigh any remaining valid aggravators against any mitigating evidence in the record, ... reweighing can only be

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[19]The State cites cases arising in North Carolina and Nebraska. Pet. 21. Both States have always permitted appellate courts to cure death sentences originally imposed on the basis of an invalid aggravating circumstance. *See, e.g., State v. Goodman*, 257 S.E.2d 569, 587 (N.C. 1979); *State v. Reeves*, 344 N.W.2d 433, 447-48 (Neb. 1984).

[20]*Williams v. Clarke, supra*, 40 F.3d at 1541 (because the state courts did not actually conduct harmless error review in petitioner's case, "we apply the *Chapman* [rather than the *Brecht*] analysis to determine if the constitutional error that we have identified requires habeas relief").

performed by a *state* appellate [court]; federal courts lack the authority to impose sentence in state criminal cases." Pet. 23 (emphasis added). Yet, the ameliorative process the Tennessee Supreme Court now uses when an aggravating circumstance is invalidated – even assuming (contra *Maynard*) that Tennessee's recently initiated process applies in this case – requires precisely the weighing of aggravating and mitigating circumstances that Tennessee concedes cannot be conducted by federal courts.[21]

This case thus does not present the question the State proposes because neither of the question's premises is satisfied. The State assumes that appellate court reevaluation rather than jury resentencing is appropriate here. Yet, as *Maynard* holds, the question whether appellate reevaluation or jury resentencing is appropriate in this case is an unresolved matter of *state* law that is inappropriate for resolution by this Court. The State next assumes that any appellate reevaluation that might occur would entail something *other* than a weighing of the relative strength of the remaining aggravating and mitigating circumstances. Yet, the appellate reevaluation in which the Tennessee Supreme Court recently has begun engaging entails just the kind of balancing of aggravation and mitigation that a federal habeas court admittedly cannot properly perform.

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[21] *State v. Howell*, 868 S.W.2d 238, 261-62 (Tenn. 1993), *cert. denied*, 114 S. Ct. 1339 (1994) (after invalidating an aggravating circumstance, court must compare the relative "strength of remaining valid aggravating circumstances" and "the nature, quality and strength of mitigating evidence," *i.e.*, it must compare "the qualitative nature of each [aggravating] circumstance, its substance and persuasiveness, as well as the quantum of evidence supporting it" and "the quantum and quality of the mitigating factors presented by the proof").

Certiorari should be denied.

CONCLUSION

The Court should deny a writ of certiorari.

Respectfully submitted,

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